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No.

SUPREME COURT OF THE UNITED STATES

October Term, 1984

STEARNS COAL AND LUMBER COMPANY, INC. - - - - - - - - - Appellant

versus

COMMONWEALTH OF KENTUCKY, NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET - - Appellee

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On Appeal From the Supreme Court of Kentucky

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. May a state, in order to create for the public a protected "wild rivers" natural area, prohibit a private landowner from making any economic use of his property and force the landowner to allow the public to share use of his land for canoeing, hiking, and recreation, without paying "just compensation" pursuant to the Constitution of the United States?

2. May a state promise compensation to private landowners whose property is declared to be in a protected "wild rivers" refuge where all private economic uses are prohibited, and then later claim that the state's actions were "police power" regulations and refuse to pay the promised compensation, without violating constitutional guarantees?

3. May a state take enforcement action under color of a state statute which deprives a landowner of any economic use of his land (including outright prohibition of extraction of all minerals), and then, when facing a taking claim, avoid liability by asserting that the enforcement actions were unlawful as a matter of state law?

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No.

STEARNS COAL AND LUMBER COMPANY, INC. - *Appellant*

v.

COMMONWEALTH OF KENTUCKY, NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET - - - - - - - - *Appellee*

On Appeal From the Supreme Court of Kentucky

JURISDICTIONAL STATEMENT

Stearns Coal and Lumber Company, Inc. (Stearns) appeals from a judgment of the Supreme Court of Kentucky denying Stearns compensation for the loss of extensive mineral and other property rights appropriated from Stearns to enable the Commonwealth of Kentucky to create two Wild Rivers refuges for public use and recreation.

OPINIONS BELOW

On January 30, 1981, the McCreary Circuit Court entered a judgment against the state after finding that the enactment and enforcement of the Kentucky Wild Rivers Act of 1972 had taken property of Stearns in violation of the Kentucky and the United States Constitutions. On November 12, 1981, a jury awarded $6.7 million in damages to Stearns. By entry of judgment on January 19, 1982, and amendment to that judgment on February 25, 1982, the McCreary Circuit Court awarded Stearns the $6.7 million plus pre-judgment interest[1] in the amount of $3,178,554.02,

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[1]Interest upon $6.7 million from the date of the taking until the date of judgment.

plus post-judgment interest on the sum of the above amounts until paid. (The various trial court judgments and opinions are at Appendix 2A through 2F).

On January 19, 1984, the Supreme Court of Kentucky, by vote of 4 to 3, reversed the trial court's judgment and held that the state could constitutionally appropriate Stearns' property for a public refuge without payment of compensation. The opinion of the Supreme Court of Kentucky (Appendix 1) is officially reported at 678 S. W. 2d 378. On November 15, 1984, the Supreme Court of Kentucky denied Stearns' Petition for Rehearing. (Appendix 3).

JURISDICTION

This appeal is taken from the decision of the Supreme Court of Kentucky dated January 19, 1984. As above noted, an order denying rehearing was entered November 15, 1984. The Notice of Appeal was filed in the Supreme Court of Kentucky on January 31, 1985. (Appendix 4). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(2) because the Supreme Court of Kentucky has sustained the validity of the state's action pursuant to a state statute against the contention that the state's action and the statute as enforced are repugnant to the Constitution of the United States.

Cases which sustain this Court's jurisdiction are: *Loretto* v. *TelePrompter Manhattan CATV Corp.*, 458 U. S. 419 (1982); *Penn Central Transportation Company* v. *City of New York*, 438 U. S. 104 (1979); *Pennsylvania Coal Company* v. *Mahon*, 260 U. S. 393 (1922).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves the Fifth and Fourteenth Amendments to the Constitution of the United States, Sections 13

and 242 of the Kentucky Constitution, and the following Kentucky statutes establishing the Wild Rivers system, the pertinent parts of which are reproduced in Appendix 5 to this appeal: (1) 1972 Ky. Acts, ch. 117; (2) 1974 Ky. Acts, ch. 206; and (3) 1976 Ky. Acts, ch. 197, § 8 (codified as Ky. Rev. Stat. 146.280).

STATEMENT OF THE CASE

The subject of this inverse condemnation action is a rugged, contiguous 27,332 acre coal property located in southeastern Kentucky. (*See* Appendix 6). The property is overlain with forests and underlain with four seams of coal. It is bounded on the east by the Big South Fork of the Cumberland River and on the west by Rock Creek. The two rivers have cut gorges through the land 450 feet deep. Like major highways, the gorges have provided the principal access to the coal seams which outcrop in the hillsides above. Also, they have enabled appellant Stearns to haul coal and timber off the property by rail, road and tramway for many years. In 1972, when the Kentucky legislature declared the Big South Fork to be a Wild River (Rock Creek was so designated in 1974), these gorges and the coal mining areas accessible from them held between 26 million and 60 million tons of commercially recoverable coal.

The Wild Rivers Act was first proposed to the General Assembly of Kentucky in 1970. Its purpose was to create a series of public, wild river refuges which would never be violated by commercial development. In fact, the proposed Act specifically prohibited every conceivable commercial activity within the gorges. The legislation was defeated by those who believed it was constitutionally infirm because it failed to guarantee just compensation to private property owners for the extensive loss of property rights which would be caused by the prohibition of commercial activity.

In 1972 a modified version of the Wild Rivers legislation was proposed and enacted. Like the first legislation it created wide, wild river corridors[2] within which the following commercial activity was prohibited: (1) new road construction, (2) new construction of buildings, (3) all mining, (4) timbering, except select cutting pursuant to regulations,[3] (5) land disturbances, including in-stream disturbances such as dredging, and (6) mechanical modes of transportation. 1972 Ky. Acts, ch. 117, § 10. (See Appendix 5).

Unlike the 1970 legislation, the Wild Rivers Act of 1972 specifically guaranteed compensation to private property owners,[4] and it authorized the state (through the Secretary of the Department of Natural Resources) to acquire property rights by purchase, grant, gift, devise, or exercise of eminent domain. Thus, the Wild Rivers Act by its own terms was never intended by the legislature to be a land use regulation of private property authorized by the police power of the state. Instead it was essentially a condemnation statute which enabled the state to acquire the ownership rights necessary for creation of the Wild Rivers refuges. While Stearns was deeply concerned with the constraints this legislation imposed on its operations,

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[2]"The Commissioner of Natural Resources shall . . . determine generally the boundaries of the stream area . . . . Establishment of these boundaries shall be accomplished in such a way that it includes at least the visual horizon from the stream, but not more than two thousand five hundred (2,500) feet from the center of the stream." (1972 Ky. Acts, ch. 117 § 6).

[3]Regulations for select cutting were never developed, and officials took the position (and so admitted in depositions) that no timber cutting would be allowed in the absence of regulations.

[4]The guarantee was: "Nothing in this Act shall be construed to deprive a landowner of his property or any interest or right therein without just compensation. 1972 Ky. Acts, ch. 117, § 9.

the company felt confident that it would receive compensation for the property it would lose.

Upon the passage of the Act the Kentucky Department of Natural Resources acted quickly to implement and enforce the new law. The Department prepared property maps which identified the Wild Rivers corridors and made them available to private property owners along the Wild Rivers. Department employees regularly entered Stearns' property to monitor activities, erect large signs, and nail smaller signs on Stearns' trees. The large signs proclaimed: "The Big South Fork River . . . is a part of the Kentucky Wild River System . . . [and] is being protected . . ." by the Commonwealth. (*See* Appendix 7). The Department prepared and distributed to private property owners a summary of the activities which were prohibited within a Wild River corridor. The Department invited the public to enter on and use Stearns' property by publishing fishing and canoeing brochures which invited the public to "put-in" and "take-out" on Stearns' private property.

In addition, the Department, through its continuous inspection of the various Wild Rivers, discovered various violations of the Act and, without exception, immediately obtained court injunctions against private property owners.[5] One property owner, Morris Stephens, was enjoined[6] by the Franklin Circuit Court on November 1, 1974 from cutting his own trees on the edge of the Cumberland River. Stearns' own oil and gas lessee (Western Reserves Oil

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[5]In no instance did the Department fail to obtain injunctive relief where a violation of the Act was discovered.

[6]The court issued a restraining order in an ex parte proceeding.

Company) was enjoined on June 25, 1975[7] from drilling for oil and gas, constructing roads, and cutting timber on some of the land that is the subject of this appeal.[8]

By these actions, the Department had implemented and vigorously enforced the Wild Rivers Act as of June 25, 1975. Throughout this enforcement period the Department assured and reassured property owners that they would be paid. These assurances were made by various Department officials to the media and to private property owners. Likewise the Department's lawyers stated (on January 20, 1975) in a legal brief in the trial court in the Morris Stephens case that "the defendant is assured of compensation by statute." The Attorney General of Kentucky issued an official opinion on November 29, 1973 saying that private property owners would be compensated for any damage caused by enforcement of the Act. Ky. Op. Att'y Gen. 73--797, (1973).

But after June 25, 1975, the Department's approach to the Wild River's legislation changed. Specifically, on August 27, 1975, when the Franklin Circuit Court considered the validity of the restraining order which it had issued against Morris Stephens, the court held that the Department could not maintain injunctions against private property owners unless it: "simultaneously with the request for injunctive relief initiate[d] proceedings either by condemnation or otherwise to compensate the landowner for

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[7]After it was enjoined, Stearns' lessee stopped paying royalties under the force majeure provision of the oil and gas lease. The trial court found this date to be the date of the taking.

[8]Even a portable sawmill operation was enjoined from cutting trees within the Rock Creek Wild River area and by agreed order the operators promised to remove "the sawdust by-products and other direct or indirect products of the sawmill or logging operation" and to reclaim the area.

the rights to his real property taken by the Commonwealth's enforcement of the Wild Rivers Act." (Opinion of Franklin Circuit Court cited in *Commonwealth ex rel. D.N.R. and E.P.* v. *Stephens,* 539 S. W. 2d 303, at 305 (Ky. 1976).

In effect, this decision (rendered three years after passage and extensive enforcement of this legislation) upheld the validity of the legislation and the right of the Department to enjoin commercial activity, but required the Department to fulfill the statute's promise of compensation by purchase or condemnation. To avoid the consequences of this decision, the Department appealed and sought amendment of the Act to reduce the restrictions so the purposes of the Act could be achieved but no compensation would have to be paid. (The Secretary so testified in this case and also said that he never intended payment of compensation).

Thus, Stearns, in late 1975, after watching the Department utilize the full powers of state government for three years to halt all commercial activity within the Wild Rivers,[9] under promise of compensation, was in essence

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[9]The statement of the Supreme Court of Kentucky that "Stearns has made substantial use of the property" is not accurate. One lessee, Western Reserves Oil Company, was enjoined from June 25, 1975 to October 28, 1977 from drilling for oil and gas, and consequently refused to pay royalties to Stearns. The only other oil and gas lease (only about 1,000 acres of which are on this property) yielded only one dollar per acre per year. The "extensive logging operations" referred to by the Supreme Court consisted solely of Stearns' effort to join this taking issue by cutting 732 trees. *See* p. 9, *infra.* Finally, Stearns gave to the Commonwealth a free lease for wildlife management on a portion of the property. By contrast, Stearns did make substantial use of property not affected by the Wild Rivers Act; during 1975 when there was a substantial coal boom Stearns sold a major underground

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informed by the Department that Stearns would not be paid and the Department would attempt to continue to accomplish the same goal in the future — the cessation of commercial activity — with fewer restrictions and no compensation. Thus, the Department's actions justified Justice Brennan's concerns. *San Diego Gas & Electric Co.* v. *City of San Diego,* 450 U. S. 621, 655 n. 22 (1981) (Brennan, J., dissenting) (noting a city attorney's advice: "If all else fails, merely amend the regulation and start over again.").

In March of 1976 the Wild Rivers Act was amended. The purpose — creation of a primitive, unspoiled preserve — was not changed. Strip mining was still prohibited, but the Act appeared to allow for deep mining and certain timber removal *if* the applicant for a permit could show (1) that the proposed activity "is in accordance with . . . the purpose and intent of the . . . Act," *see* Ky. Rev. Stat. § 146.290(3),[10] and (2) that the activity is in accordance with a management plan to be developed pursuant to Ky. Rev. Stat. § 146.270.[11]

In the 1976 revision of the Act, the legislature again expressly guaranteed that landowners would be paid. The new language provided: "Nothing in [the Act] shall be construed to deprive the landowner of the fee simple title

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mine near this property. During this time Stearns could neither sell nor lease any of its coal reserves on the "taken" property, although mineral rights were all Stearns owned on 2/3 of the "taken" property. Thus, the fact is Stearns could not and did not make substantial use of this property from 1972 to 1975 and after.

[10]It is difficult to imagine a deep mine or timber cutting operation that would be consistent with an unspoiled wild river.

[11]The Department never developed a management plan for the Big South Fork and did not develop such a plan for Rock Creek until June, 1980.

to or lesser interest in his property without just compensation." Ky. Rev. Stat. § 146.280. Frustrated by four years of being forbidden to use its land and not being paid the compensation promised by statute, and now facing the prospect of a new set of prohibitions and aware that it would never receive compensation without litigation, Stearns informed the Department on April 6, 1976 that it would commence timber cutting within the protected Big South Fork Wild River area. The Department responded by issuing an Order to Abate and Alleviate against Stearns under authority of an *unrelated* water quality control statute (Ky. Rev. Stat. § 224.081). Because this proceeding was not legally sound, Stearns obtained an injunction ordering the Department not to enforce this order under Ky. Rev. Stat. § 224.081. (This injunction did not restrain the state from enforcement against Stearns of any provision of the Wild Rivers Act.) Since this skirmish had not joined the issue of whether the Department owed compensation to Stearns for a wrongful taking, Stearns had no alternative but to bring, on May 25, 1976, an inverse condemnation against the Commonwealth of Kentucky.

The Department continued to deny it owed Stearns any compensation. Also, the Department continued to make it clear that it would not permit commercial activity within a Wild River area. When the Supreme Court of Kentucky ruled in *Commonwealth Dept. of Natural Resources* v. *Stephens*, 539 S. W. 2d 303 (Ky. 1976), on July 2, 1976 that the Department could not enjoin violations until it had properly "designated" the boundaries, the Department immediately "designated" the boundaries within twenty days.[12] Likewise, in December of 1976 the Depart-

[12]One of the principal grounds for the Supreme Court's holding of no taking was that all of the state's enforcement actions

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ment discovered and stopped a small deep mine operation on private property in Martin's Fork Wild River area.

On June 24, 1977 the head of the Department testified in a deposition in this lawsuit that, in spite of the amendment, the Department would not allow strip mining, clear cutting of timber, or construction of buildings or roads within a wild river. Still later, on July 12, 1978, the official in charge of enforcing the Act testified that there were no standards (no management plan having been prepared) for deep mining or timber cutting in a wild river, and that whether an operator would get a permit would be up to the total discretion of the Department. Thus, for a period of six years the Commonwealth had successfully prohibited all commercial activity within the wild rivers.

After July 1978, while Stearns was pursuing this cause of action for damages, Stearns was notified that the United States wanted to purchase 16,223 acres of various Stearns properties in Kentucky[13] which included 12,227 acres of the 27,332 acre tract damaged by the Wild Rivers Act. Ultimately, after lengthy negotiations and under threat of condemnation, Stearns sold to the United States on August 9, 1979 the 16,223 acres including 12,227 of the acres which had been damaged by the Wild Rivers Act, for approximately $7.4 million.[14]

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over the previous four years were a nullity since the property maps had not been "designated" in the way required by state law. 678 S. W. 2d at 381.

[13]For creation of the Big South Fork National River and Recreational Area, to be administered as a national park.

[14]Although at the time of this sale the Commonwealth did not claim any title or other property right in the 12,227 acres it had damaged by its regulations, suddenly at trial the Commonwealth argued it should receive (by way of setoff against the judgment)

(Footnote continued on following page)

Then, in 1980 this case was submitted to the trial court for a decision on the "taking" question and on January 30, 1981 the trial court held the Commonwealth had taken 27,332 acres of Stearns' property on June 25, 1975 in violation of the Kentucky and United States Constitutions. At the subsequent trial on damages the jury awarded $6.7 million damages, and the trial court awarded $3,178,554.02 pre-judgment interest and interest on the judgment. On appeal, the Kentucky Supreme Court reversed, held that no taking had occurred, and stated that if there had been a taking Stearns would not be constitutionally entitled to pre-judgment or post judgment interest.

The Supreme Court held that as a matter of Kentucky law, the deprivations of property Stearns suffered did not entitle Stearns to money damages. *See* n. 20, *infra*. The court said that "the Wild Rivers Act, if it had been fully executed, could have been a taking." 678 S. W. 2d at 381. But the court held no taking had occurred because after the Act was passed, efforts by State officials to enforce the law (even though successful) were legally defective inasmuch as all enforcement actions were later invalidated by the courts. *Id.* Likewise, the court said that even if some enforcement actions unconstitutionally infringed on Stearns' property rights, Stearns should have sought to enjoin those actions, instead of suing for damages. *Id.* The court stated that even after enactment of

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so much of the proceeds of this sale as could be attributable to the 12,227 acres damaged by the Wild Rivers Act. The trial court disagreed and held that Stearns had a right to retain any monies it could later obtain for property taken or damaged by the Commonwealth. The Supreme Court of Kentucky said in dictum that this sale had relevance to the "possible" setoff but did not explain what relevance. This issue relates solely to damages and not to the taking question.

the Wild Rivers Act, Stearns still utilized some of its property for select timber cutting (732 trees were actually cut) and for hunting and fishing. Stearns had also leased gas and oil rights, but the leases ceased producing revenue because enforcement of the Wild Rivers Act prevented the lessees from drilling. *See* n. 7 and 9, *supra*.

WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. The United States Constitution Requires a State to Pay Just Compensation to a Private Landowner if in Order to Create for the Public a Protected "Wild Rivers" Natural Area, it Prohibits the Landowner From Making Any Economic Use of His Property and Grants Public Access to the Land for Canoeing, Hiking and Recreation.

Since *Euclid* v. *Ambler*, 272 U. S. 365 (1926), it has been clear that the state can assert police power to limit the use of privately-owned land, even if the regulation reduces significantly the value of the land. Recent cases have reaffirmed that view. *Agins* v. *City of Tiburon*, 447 U. S. 255 (1980); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104 (1978). *See also Hodel* v. *Virginia Surface Mining and Reclamation Ass'n*, 452 U. S. 264 (1981).

But from the invention of zoning it has also been clear that the constitution places limits on the extent to which the majority, by regulations that restrict land use, can "take" for the public benefit the effective authority to use and enjoy land. *Loretto* v. *TelePrompter Manhattan CATV Corp.*, 458 U. S. 419 (1982); *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979); *United States* v. *Causby*, 328 U. S. 256 (1946); *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922). The words of Justice Holmes are among the most quoted in our jurisprudence: "[W]hile property may be regulated to a certain extent, if regulation goes too far it

will be recognized as a taking." *Pennsylvania Coal Co.* v. *Mahon, supra,* 260 U. S. at 415.

In recent years government has been imaginative and skillful in finding ways to pursue public objectives through restrictions on "private" land. In particular, environmental protection legislation has taken new forms, as government seeks to pursue worthy public goals but resists the duty to pay the true social costs from limited revenues.

Although it has become a commonplace to intone that doctrinal generalizations fail when applied to the facts of "takings" cases,[15] in fact this Court has recently spelled out with some clarity the factors that should be considered in assessing a takings claim. In *Penn Central Transportation Co.* v. *New York City,* 438 U. S. 104 (1978), the Court said: "In deciding whether a particular governmental action has effected a taking, this Court focuses . . . both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . ." 438 U. S. at 130-131. That case also urged attention to "the extent to which the regulation has interfered with distinct investment-backed expectations . . ." *Id.* at 124. Later cases have continued to use this language, and have contributed to an understanding of what "character of the action," "nature and extent of the interference," and "distinct investment-backed expectations" mean. *E.g., Agins* v. *City of Tiburon,* 447 U. S. 255 (1980); *PruneYard Shopping Center* v. *Robins,* 447 U. S. 74 (1980); *Kaiser Aetna* v. *United States,* 444 U. S. 164 (1979).

By the standards laid down in the opinions of this Court, the actions of Kentucky "took" appellant's property. First, the "character" of the State's action was to preserve a large wilderness area unspoiled for future gen-

[15] *See, e.g.,* Sax, *Takings and the Police Power,* 74 Yale L.J. 36 (1964).

erations. Kentucky was adding this area to its state park system. In no way does this regulatory scheme preserve "the best use of appellants' land," as did the zoning upheld in *Agins* v. *City of Tiburon, supra.* Nor is it a general scheme benefiting and burdening many owners. Rather this law takes rights from a few owners and adds major acreage to the land available to the entire public for recreation. Indeed, Kentucky officials posted signs on Stearns' land that told the public that the land was now public land. In character, therefore, this is the kind of action for which government has traditionally paid. It is no coincidence that the legislature provided for compensation when it enacted the statute.

Second, the "nature and extent" of the deprivation to appellant are draconian. Before the Wild Rivers law was enacted, Stearns owned mineral-only rights in thousands of acres of prime coal land and surface and mineral rights in thousands of acres more. When Kentucky, seeking for understandable reasons to preserve "wild rivers" areas, banned mining, Stearns found where it owned only minerals that its mineral holdings had been rendered worthless and where it owned both surface and minerals it was left only with the right to enjoy the aesthetic beauty of the surface. And worse still, Kentucky sought to achieve this gain to the citizenry without imposing upon them the burden of paying the private landowner whose property had now been rendered economically worthless.

Third, the Stearns family and later the Stearns Company had invested in this land over many decades, always treating the land as a valuable mineral resource for the company and for the nation. As discussed *infra* pp. 19-25, Stearns also "invested" in the promises of compensation made by the legislature in the enactment of the Wild

Rivers Act. Stearns and other owners withheld vigorous opposition from the legislation, and then waited patiently for the statutorily promised compensation.

A number of state cases have addressed the question of whether environmental regulatory action can prevent all development and also give public access to private land without compensating the landowner. In *Just* v. *Marinette County*, 56 Wis. 2d 7, 201 N. W. 2d 763 (1972), the Wisconsin Supreme Court upheld placing land in a "wetland" district. The result was that the landowner could not build the vacation house that was the reason he bought the land. Mr. and Mrs. Just retained exclusive rights to possess the land, and could presumably occupy it in a sleeping bag or stand on it and look at ducks. But Wisconsin did not give public access to the Just land. Other states have refused to allow what Wisconsin permitted. For example, the New Jersey Supreme Court held that an ordinance requiring that swampland be kept in its natural state was a taking for public purposes that required just compensation. *Morris County Land Improvement Co.* v. *Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A. 2d 232 (1963). *See also Bartlett* v. *Zoning Commission*, 161 Conn. 24, 282 A. 2d 907 (1971). In an advisory opinion the Massachusetts Supreme Judicial Court said that the legislature would have to pay compensation if it wished to create an "on-foot right of public passage" over privately owned beach land. *Opinion of the Justices*, 365 Mass. 681, 313 N. E. 2d 561 (1974). Other cases have been more open to regulation that requires landowners to share the use of their land. *See, e.g., Matthews* v. *Bay Head Improvement Ass'n.*, 95 N. J. 306, 471 A. 2d 355 (1984), *cert. denied*, 105 S. Ct. 93 (1984). But no case has gone so far as the Kentucky Supreme Court did here: approving uncompensated

regulation that both bars all economic use and requires the owner to share possession with the public. This is truly to create a public park at the expense of a single owner.[16]

In this case the Kentucky Supreme Court failed to employ the analytic structure supplied in recent cases by this Court. For example, in *Agins* v. *City of Tiburon, supra,* 447 U. S. at 260, this Court said:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land. The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest . . . [Citations omitted].

In upholding the imposition of conventional zoning limits on appellant's land in *Agins* v. *City of Tiburon,* the Court pointed out that appellants "will share with other owners the benefits and burdens of the city's exercise of its police power." 447 U. S. at 262. Here, the owner is denied nearly all viable use of his land by an exercise of state power that will benefit many people, now and in the future, but that supplies almost no benefit to the Stearns Company. This Court said that the ordinances at issue in the Agins case "neither prevent the best use of appellants' land nor extinguish a fundamental attribute of ownership."

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[16]For one among many lower federal court cases applying this Court's analytic structure to complicated regulatory circumstances, *see Amen* v. *City of Dearborn,* 718 F. 2d 789 (6th Cir. 1983), *cert. denied,* 104 S. Ct. 1596 (1984), holding that the city's regulatory actions "took" landowners' property. It would be difficult to reconcile the decision of the Kentucky Supreme Court in the case on appeal with the decision of the Court of Appeals for the Sixth Circuit in *Amen.*

Id. Here there is no dispute that the best economic use of the land — coal mining — is prevented, that the public has been told it can now share use of the land with the "owner," that no economically productive use remains to the owner, and that the company can no longer follow an ownership strategy of waiting to sell, lease, or otherwise utilize its mineral resources when the price and the technology are right. Stearns no longer has the "fundamental attributes of ownership" of this land.

This Court clearly stated the applicable rule in *Kirby Forest Industries, Inc.* v. *United States,* 104 S. Ct. 2187, 2196 (1984):

> [A] radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property.

This case, therefore, squarely presents an important question of U. S. constitutional interpretation, requiring resolution from this Court. Supreme Court guidance is especially important since new arrangements for the preservation of land are constantly being considered by state governments, and if not reviewed by this Court, the Kentucky Supreme Court's decision in this case will encourage other states to add to their state park systems "on the cheap." They too will purport to leave "ownership" in private hands, but will bar private use and, indeed, order that the public be allowed to share enjoyment.

The Wild Rivers Act is especially burdensome to Stearns because the company owns only the mineral rights to the bulk of this land. *Pennsylvania Coal* said clearly that the state could not bar mining even with the legitimate and important goal of preserving residential housing. For

60 years that holding has been cited as part of the foundation of U. S. "takings" jurisprudence. In *Pennsylvania Coal,* Justice Holmes was especially influenced by the fact that two parties had divided by agreement the total ownership rights to the parcel, giving the coal company the right to mine even if the surface was affected. Here the same is true. Other owners possess the "surface" rights on much of this property, from the Stearns Company, leaving Stearns the coal and the right to mine the coal. Now Kentucky has said that the coal may not be mined. Holmes wrote in *Pennsylvania Coal,* 260 U. S. at 414:

> [T]he extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land — a very valuable estate — and what is declared by the Court below to be a contract hitherto binding the plaintiffs. . . . . What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.

This case is not distinguishable. Kentucky seeks to remove from private use valuable property that has been the subject of investment and reliance. The state believes the public would be served, because a wilderness area will be established. Until now, this Court has always held that the state can make such additions to the stock of public property only if it is willing to analyze the costs and benefits and pay compensation for the valuable right obtained for the public. That principle of constitutional interpretation should remain, even in this period of extensive regulation for environmental and other purposes. Since the Kentucky Supreme Court has disagreed with a long-

standing and important principle of Fifth Amendment jurisprudence, this Court should note probable jurisdiction and reverse the state decision.[17]

2. The United States Constitution Does Not Permit a State to Promise Compensation to Private Landowners Whose Property Is Declared to be in a Protected "Wild Rivers" Refuge Where All Private Economic Uses Are Prohibited and Later Claim the State's Actions Were "Police Power" Regulations Requiring No Compensation.

The Wild Rivers Act called for appellant's land "to be maintained in a natural state . . . for the perpetuation of Kentucky's wild fauna and flora." Ky. Rev. Stat. § 146.220. When Kentucky enacted that law, it promised landowners that it would pay for any property rights that it "took" as part of the program. The 1972 statute said:

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[17]It would also be appropriate for this Court to address the issue of whether the United States Constitution requires payment of interest from the date of taking as part of just compensation to the landowner. The Supreme Court of Kentucky held that the award of interest was erroneous because "[w]e have not found a single inverse condemnation case from any jurisdiction, including Kentucky, which supports an award of interest against a government." 678 S. W. 2d at 383. To the contrary, a number of federal and state courts have expressly held that interest from the date of taking is constitutionally mandated in inverse condemnation cases. Recent examples include: *Milens of California* v. *Richmond Redevelopment Agency*, 665 F. 2d 906 (9th Cir. 1982); *Santos* v. *Government of Guam*, 415 F. Supp. 1 (D. Guam 1973); *Holtz* v. *San Francisco Bay Area Rapid Transit District*, 17 Cal. 3d 648, 131 Cal. Rptr. 646, 552 P. 2d 430 (1976); *Stewart* v. *City of Key West*, 429 So. 2d 785 (Fla. App. 1983); *Herman* v. *City of Wichita*, 612 P. 2d 588 (Kan. 1980).

While this Court has not addressed this issue directly, it has held in a condemnation case that the landowner is entitled to interest when the government fails to pay just compensation at the time of taking "to insure that he is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation." *Kirby Forest Industries, Inc.* v. *United States*, 104 S. Ct. 2187, 2194 (1984).

"Nothing in this Act shall be construed to deprive a landowner of his property or any interest or right therein without just compensation." 1972 Ky. Acts, ch. 117, § 9. The 1976 re-enactment used similar language: "Nothing in [the Act] shall be construed to deprive the landowner of the fee simple title to or lesser interest in his property without just compensation." 1976 Ky. Acts, ch. 197, § 8, codified at Ky. Rev. Stat. § 146.280.

On November 29, 1973, in response to a request from a journalist for the Louisville Courier-Journal, Ed W. Hancock, Attorney General of Kentucky, issued an opinion saying that "at the moment this Act went into effect the restrictions on the use of land it contained became applicable," "all development not in accordance with [the Act] is prohibited," and the affected property owners will be compensated. The opinion counselled patience as to actual payment of compensation: "Of course, the acquisition of these interests is a tremendous administrative task which cannot be accomplished without some delay."

Subsequently on July 2, 1976 the Kentucky Supreme Court itself reaffirmed the act's promise of compensation in pungent terms: "Clear, concise, straight, and to the point: The legislature said that the state may take a person's property, but when it does it must pay for what it takes." *Commonwealth ex rel. D.N.R. and E.P.* v. *Stephens, supra,* 539 S. W. 2d at 306.

What then happened is that the Commonwealth, perhaps strapped for money, decided not to pay and to press "police power" regulation to its limits and refuse compensation. Ultimately, the Kentucky Supreme Court upheld the strategy of preserving wild rivers without compensating landowners. The court concluded that barring Stearns from mining was only a regulation and not a tak-

ing because (1) until the state's enforcement actions were in compliance with the statute they could not, no matter what their consequences to the landowner, cause a taking and, (2) the state's interference was not sufficiently abusive under existing cases (notwithstanding the fact that all mining was barred by statute from 1972 to 1976, that the permitting scheme authorized by the Amendments was never implemented by the state, and that the record at trial contained testimony of state officials that mining would not be allowed in wild rivers areas) to constitute an excessive use of the police power. Nowhere in its analysis did the court discuss or attach any significance to the state's repeated promises of compensation.

Beginning with *Goldberg* v. *Kelly,* 397 U. S. 254 (1970), this Court has developed a jurisprudence of constitutionally protected property rights in the promises of states upon which individuals are officially encouraged to rely. This series of cases is an inevitable consequence of a political economy in which claims against government — entitlements, privileges, licenses, and contracts — are so important to individuals. As Charles Reich showed when he criticized *Flemming* v. *Nestor,* 363 U. S. 603 (1960),

> If the individual is to survive in a collective society, he must have protection against its ruthless pressures. There must be sanctuaries or enclaves where no majority can reach. . . . These were the objects which property sought to achieve, and can no longer achieve. The challenge of the future will be to construct, for the society that is coming, institutions and laws to carry on this work. . . . We must create a new property.

Reich, *The New Property,* 73 Yale L. J. 733, 787 (1964). Since Reich wrote, the Court has repeatedly recognized that if there are to be liberty, fairness, and efficiency in an

economy so much a mixture of private and public decision, claims less tangible than those called "real property" at common law must nonetheless be treated as constitutionally protected property. Thus the Court has analyzed as property claims to jobs, welfare benefits, and trade secrets.[18]

Although the Court has not been unanimous in every aspect of its "new property" jurisprudence, all Justices have agreed that one important issue is the content of the assurances given by government and the extent to which the state has encouraged and obtained reliance upon its assurances. *See* n. 18, *supra.* Of particular significance is the language in *Kaiser Aetna* v. *United States, supra:* "the fruition of a number of expectancies embodied in the concept of 'property' — expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property." 444 U. S. at 179. The Court has repeatedly made clear that federally protected expectations arise from the actions and behavior of authorized state officials. "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus* v. *Monsanto Co., supra,* 104 S. Ct. at 2872, *quoting from Board of Regents* v. *Roth, supra,* 408 U. S. at 577.

If Kentucky had initially sought to protect wild rivers by regulation without compensation, affected landowners

[18]*See, e.g., Ruckelshaus* v. *Monsanto Co.,* 104 S. Ct. 2862 (1984); *O'Bannon* v. *Town Court Nursing Center,* 447 U. S. 773 (1980); *Kaiser Aetna* v. *United States,* 444 U. S. 164 (1979); *Board of Curators* v. *Horowitz,* 435 U. S. 78 (1978); *Bishop* v. *Wood,* 426 U. S. 341 (1976); *Goss* v. *Lopez,* 419 U. S. 565 (1976); *Arnett* v. *Kennedy,* 416 U. S. 134 (1974); *Perry* v. *Sindermann,* 408 U. S. 593 (1972); *Board of Regents* v. *Roth,* 408 U. S. 564 (1972); *Goldberg* v. *Kelly, supra.*

would have had an entirely different attitude to the program. They would have opposed enactment, and might well have succeeded in defeating it. Also, they would have moved speedily to exploit their mineral and other resources.

Instead, the state lulled owners into passivity by repeatedly promising to pay. Landowners relied by waiting patiently for the state's ponderous bureaucracy to decide what portions of the owners' fees it wished to "take," and to affix a valuation. For all these years, appellant waited to be paid for the rights to mine and to build and to timber that the Wild Rivers Act obviously "took." And for all this time state officials were engaging in actions large and small that made it clear that no economic use of this land would be allowed, and that eventually appellant would be paid for what it was giving up.

Finally, appellant brought its actions for inverse condemnation damages, litigated all the issues before a McCreary County jury, and received an award of $6.7 million for the property rights taken from it. Only when that judgment was reversed by the Kentucky Supreme Court, in the decision from which this appeal is taken, did appellant finally know that Kentucky was reneging on its many promises of compensation.

From the enactment of the statute, appellant held the promise of the state that valuable property interests—rights to mine coal and cut timber—would be purchased by the state as part of the Wild Rivers program. Appellant relied on those promises. Now, having refrained or been prevented from mining or timbering, it is told that its forbearance was based on official promises—including the words of two statutes, an opinion of the state attorney

general, and the *Stephens* decision by the state's highest court—on which it should not have relied.

Property owners in 1985 know that much of the value of their investments is a result of government programs and official permissions. That is a fact of contemporary political economy. More and more, therefore, "property" means rights extended or confirmed by government. In the England of the common law, property was the foundation of liberty—the individual's space upon which not even the King could trespass. Today, property remains essential to liberty—and to fairness and to efficiency. There will be no fairness and no reliable investment unless government is held to its commitments. The decisions of this Court in cases about government jobs, about welfare benefits, and about trade secrets should apply as well to property claims in the right to use land or to be compensated if use is denied. The undisputed facts of this case are an egregious example of government, speaking at the highest and lowest levels, making promises, extracting reliance upon those promises, and then declaring that its agents were unauthorized and that the promisee lost out because he believed the official agents of the Commonwealth. The case therefore presents for consideration by this Court the right of the citizen to rely on government promises, and the significance under the Fifth and Fourteenth Amendments of that important aspect of contemporary property rights which consists of the expectation that government will honor its promises.[19]

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[19]As this Court has recognized, there is a close connection between the jurisprudence of the Takings Clause and that of the Contracts Clause. Each constitutional provision is an assurance to the citizen that courts are available to hear claims that government has failed to keep its promises. *United States Trust Co.* v. *New Jersey*, 431 U. S. 1 (1977).

3. The United States Constitution Requires Just Compensation to a Landowner Whose Property Is Taken for Public Purposes Under Color of a State Statute Even If a State Court Later Holds That the Actions Depriving the Landowner of Any Economic Use of His Property Were Invalid Because in Violation of State Law.

At trial, extensive evidence was taken of the activities of Kentucky officials enforcing the Wild Rivers Act. Those enforcement activities included the prevention of mining and timbering by Stearns and its lessees, posting public-access signs on Stearns' surface-owned land and trees, and stating publicly that no mining would be permitted.

The Kentucky Supreme Court held that the state's actions limiting Stearns' use of its property could not amount to a taking because the actions were illegal enforcement of the Act. The court conceded that the restrictions imposed by the Wild Rivers Act could have been[20] a taking if the Act had been "fully executed," or validly enforced. Nevertheless, the court disregarded the state's actions for four years prior to July 22, 1976 (when the Wild Rivers boundaries were officially "designated" by officially stamping and formally publishing previously used maps) as being incapable of effecting a taking, even though these actions included trespass and the erection of signs on Stearns' land, the circulating of brochures which invited the public to use the Wild Rivers by access over Stearns' land, the procurement of an injunction against Stearns own oil and gas lessee, and by announcing in handbills and through the news media to prospective land purchasers or lessees that no commercial activity would be permitted in the wild rivers areas. The court concluded that because these ac-

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[20]This same court in *Stephens* in 1976, before it knew what had happened to Stearns, said enforcement of the restrictions "would" have been taking.

tions preceded the formal publication of the required maps, they could be ignored as if they had never taken place even though for the years prior to 1976 their effect upon Stearns was to curtail severely Stearns' private property rights and to dedicate Stearns' land to the public use just as completely as if they were valid and enforceable.

This case therefore presents the question whether a landowner is entitled to damages for unconstitutional "taking" of his property when the actions of state officials that "take" the property are later determined to have been in violation of state law. It is the position of appellant that ever since the enactment of the Wild Rivers Act in 1972, its property has been effectively part of the state park system of Kentucky. That the officials who exercised public authority over appellant's land have now been held to have acted outside their authority makes no difference to the fact that appellant's property was "taken" and used by the state for that entire period.

The issue of whether a state can avoid responsibility for official takings of private property by arguing that they were unauthorized by state law is currently pending before this Court. *Hamilton Bank* v. *Williamson County Regional Planning Commission,* 729 F. 2d 402 (6th Cir.), *cert. granted,* 105 S. Ct. 80 (1984). In that case this Court has been asked to say that it agrees with the view expressed for four Justices by Justice Brennan in his dissenting opinion in *San Diego Gas & Electric Co.* v. *City of San Diego,* 450 U. S. 621 (1981). Justice Brennan wrote that if a constitutionally invalid regulation is in force for a period of time, the landowner has a right to money damages for his lost value. Justice Rehnquist, concurring in *San Diego,* seemed to agree with the position. Certainly, many lower courts have taken their cue from the position that five

justices seemed to express in *San Diego*. For example, in *Hernandez* v. *City of Lafayette*, 643 F. 2d 1188 (5th Cir. 1981), the court held that a municipality is not entitled to absolute immunity from liability in damages under 42 U.S.C. § 1983 for actions taken by it in its legislative capacity. In support of this holding, the court cited the reasoning of Justice Brennan's *San Diego Gas* dissent and stated, 643 F. 2d at 1200, that:

> [A]n action will lie under § 1983 in favor of any person whose property is taken for public use without just compensation by a municipality through a zoning regulation that denies the owner any economically viable use thereof. The measure of damages in such a case will be an amount equal to just compensation for the value of the property during the period of the taking.

In *Burrows* v. *City of Keene*, 121 N. H. 590, 432 A. 2d 15 (1981), the Supreme Court of New Hampshire "agree[d] with Justice Brennan" that damages can be collected for an inverse condemnation, and held that the city's amendment of its zoning ordinance, which had the effect of including in a conservation district a substantial parcel of land which plaintiff had planned to subdivide, constituted inverse condemnation entitling plaintiff to damages. 432 A. 2d at 20. The court rejected "out of hand" the approach of "cases such as *Agins* v. *Tiburon*, 24 Cal. 3d 266, 598 P. 2d 25, 157 Cal. Rptr. 272 (1979), *aff'd on other grounds*, 447 U. S. 255 (1980), which hold that a landowner . . . may not recover damages for inverse condemnation . . . ." *Id.* at 20. Other cases which have accepted Justice Brennan's opinion as the view of a majority of this Court include *Martino* v. *Santa Clara Valley Water District*, 703 F. 2d 1141 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 151 (1983); *Pratt* v. *State Department of Natural Resources*, 309 N. W. 2d 767 (Minn. 1981); *Ripley* v. *City of Lincoln*, 330 N. W. 2d 505 (N.D. 1983).

The Kentucky Supreme Court's decision on the effect of illegal or unauthorized government action on the claim for damages due for a "taking" is in direct conflict with the position of the U. S. Court of Appeals for the Sixth Circuit. In *Hamilton Bank* v. *Williamson County Regional Planning Commission*, 729 F. 2d 402 (6th Cir.), *cert. granted*, 105 S. Ct. 80 (1984), a planning commission first approved an owner's development plans but much later disapproved the plans under revised zoning regulations. The Court of Appeals affirmed a judgment that because substantial investment-backed expectations had developed the action was an unconstitutional taking of property. In addition, the court reinstated a jury verdict for $350,000 as damages from the taking. The court said:

> [T]he District Court apparently concluded as a matter of law that the *application* of zoning regulations in a manner impermissible under state law . . . could not be a taking. This argument is belied by cases which consistently indicate that the application of the zoning laws, rather than the mere existence of a valid zoning ordinance, may effect a taking . . . . Since it is the application of the laws or regulations which effectuates the taking, it makes no difference for fifth amendment purposes whether the particular application is consistent with state law.

729 F. 2d at 407 (emphasis in original). Similarly, in *Fountain* v. *Metropolitan Atlanta Rapid Transit Authority*, 678 F. 2d 1038 (11th Cir. 1982), the court stated:

> If official authorities act an behalf of the state so as to take private property for public use without just compensation, even if they are acting outside of the scope of their official powers, they have violated the fifth and fourteenth amendments and are subject to an inverse condemnation suit.

678 F. 2d at 1043. *Accord, Morton Thiokol, Inc.* v. *United States,* 4 Cl. Ct. 625, 632 (1984) ("The right to just compensation does not depend upon the Government's action assuming such formal garb as a final administrative order, but only upon Government action having the effect of an exercise of the eminent domain power.")

The Kentucky Supreme Court's treatment of pre-1976 state actions as being unlawful and so incapable of effecting a taking conflicts irreconcilably with this Court's pronouncements. One pointed expression was Justice Stewart's statement in his concurring opinion in *Hughes* v. *Washngton,* 389 U. S. 290 (1967), that "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does.*" 389 U. S. at 298. Similarly, in *Agins* v. *City of Tiburon,* 447 U. S. 255 (1980), the Court said that "the *application* of a general zoning law to particular property effects a taking if the ordinance . . . denies an owner economically viable use of his land . . ." 447 U. S. at 260 (emphasis added). *See also Davis* v. *Newton Coal Co.,* 267 U. S. 292 (1925).

This view is clearly correct. In contemporary circumstances, when regulatory proceedings can take a long time and when landowners can be forced to seek approval from many units of government (which sometimes take conflicting positions), it will frequently be the case that the landowner will have been unlawfully restricted from using his land for an extended period, at substantial financial loss, and will not be able to establish that fact until he has carried the matter to an appellate court. If the purported regulatory action was in violation of the U. S. Constitution, the owner's rights under that Constitution cannot be adequately safeguarded by a long-after-the-fact declaration that the unconstitutional infringement was a nullity. In such a case, as Justice Brennan wrote in *San Diego Gas,*

something substantial has been "taken" from the owner, and money damages should be paid. As the Sixth Circuit noted in *Hamilton Bank, supra,* 729 F. 2d at 407 n. 6:

> Carried to its extreme, a holding that a deprivation of property in a manner inconsistent with state law cannot be a taking would have the result in most states that there never could be a taking without just compensation in violation of the fifth amendment. Since most state constitutions prohibit takings without just compensation, . . . such takings would always be inconsistent with state law in those states.

One state prohibiting such uncompensated takings is Kentucky. Ky. Const. §§ 13, 242. Thus the Kentucky Supreme Court's holding in this case is the "exception" which will swallow not only the state constitutional "rule" but the Fifth Amendment as well unless this Court exercises its duty of review.

The Court is likely to shed light on this issue in *Williamson County Regional Planning Commission* v. *Hamilton Bank* (No. 84-4). The action taken there will be relevant to the appropriate disposition of this case.

CONCLUSION

For all the foregoing reasons appellant respectfully requests this Court to find probable jurisdiction.

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APPENDIX

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APPENDIX 1

RENDERED: JANUARY 19, 1984
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

83-SC-183-TG
83-SC-78-TG
(Consolidated with 82-SC-279-TG)

COMMONWEALTH OF KENTUCKY, NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET - - - - *Appellant/ Cross-Appellee*

v.

STEARNS COAL AND LUMBER COMPANY - - *Appellee/ Cross-Appellant*

Appeal from McCreary Circuit Court
Civil Action No. 2994
Hon. J. B. Johnson, Jr., Judge

OPINION OF THE COURT BY JUSTICE WINTERSHEIMER—REVERSING

This appeal is from an inverse or reverse condemnation action in which the Department of Natural Resources appeals from a judgment awarding Stearns damages for the taking of the Stearns property. Stearns has filed a cross-appeal seeking a higher prejudgment interest.

The trial judge in a pretrial order found that there was a taking as of June 25, 1975, and the jury trial was then limited to the question of damages. The jury verdict was for $6.7 million against the Commonwealth and the trial judge held the Commonwealth liable for prejudgment

and post-judgment interest, bringing the total award to $9,878,554.02.

The principal and threshold issue is whether the trial judge committed reversible error in finding that the Wild Rivers Act affected a legally compensable taking of the Stearns property.

In 1972, the Kentucky General Assembly enacted the Wild Rivers Act, which was codified as KRS 146.210 *et seq.* The acts included a part of the Big South Fork of the Cumberland River in McCreary County in the Wild Rivers system. In 1973, the Department of Natural Resources developed general but imprecise boundary maps. This Court held that these maps did not meet the statutory requirement of designating the boundaries. *Commonwealth, Dept. of Natural Resources & Environmental Protection* v. *Stephens,* Ky., 539 S. W. 2d 303 (1976).

In 1974, Rock Creek, in McCreary County, was included by the legislature in the Wild Rivers system and general boundary maps were prepared for that area. Between 1973 and 1975, the department developed informational brochure on fishing and canoeing, circulated literature on activities which were prohibited, had two staff inspectors place signs along the wild river streams welcoming the public to the area, and making other inspections of the region.

In 1974, the Department obtained a restraining order in Franklin Circuit Court which ultimately led to the decision in *Stephens, supra.* In 1975, the Department obtained a restraining order against Western Reserves Oil Company for violations along Rock Creek. As a result of the court decisions in those actions, the legislature adopted Department proposed amendments to become effective June 19, 1976.

On April 7, 1976, prior to the effective date of the amendments, the Department received a letter from Bob

Gable, Chairman of the Board of Stearns, indicating that his company was to begin a large-scale, multiple-use land development, clear cutting of timber, construction of vacation and retirement homes, deep mining, strip mining, extension of their railway system, oil and gas drilling and new road construction. This amounted to an inauguration of every activity that was then prohibited in the Wild Rivers area. It was an obvious challenge to the right of the Commonwealth to proceed with the Wild Rivers program. On April 15, 1976, the Department issued an administrative order to abate pursuant to KRS 224.071, directing Gable to discontinue any threatened action until a hearing could be held before a hearing officer on April 22. Before the hearing, Stearns obtained a restraining order enjoining the Commonwealth from proceeding with any hearing on the abatement order. On April 23, the Franklin Circuit Court granted a temporary injunction against the Commonwealth enjoining them from otherwise interfering with any activity or operation by Stearns in connection with the timbering and/or foresting of trees.

On May 25, 1976, Stearns filed this inverse condemnation suit. The 1976 amendments became effective June 19. On July 2, this Court rendered the decision in *Stephens,* holding that there can be no violation of the Wild Rivers Act until the stream area is designated. On July 22, the Commonwealth formally published maps designating the boundaries of the Wild Rivers Act consistent with the statutory amendments.

On January 30, 1981, the trial judge found the Commonwealth to be liable for taking and damaging the Stearns property in violation of the Kentucky and United States Constitutions. This appeal followed.

This Court reverses the judgment because the trial court erred in finding the Wild Rivers Act had taken the Stearns' property.

The circuit court pretrial order was clearly erroneous and is not supported by the evidence. In *Stephens, supra,* this Court held that until the stream areas were designated, the Commonwealth could not enforce the prohibitions of the act against any property owner. Consequently, there was no taking of the Stearns' property as a matter of law.

The Stephens case was the first exercise by the Commonwealth of any legal action against any property owner. The injunction against Western Reserve Oil Company, a lessee of Stearns, was set aside by this Court following the holding in *Stephens.* The order to abate of April 15, 1976, was enjoined by the circuit court. The passage of the Wild Rivers Act was not a taking of the property. The enforcement of the act could not have occurred until at least July 22, 1976, when the boundaries were officially designated by proper regulation. Accordingly, the trial court committed reversible error and was clearly erroneous as a matter of law when it found the date of the taking to be June 25, 1975.

The question of a legal taking is crucial. A taking is generally defined as the entering upon private property and devoting it to public use so as to deprive the owner of all beneficial enjoyment. Private property shall not be taken without just compensation. *See* 26 Am. Jur. 2d, *Eminent Domain,* § 157.

This case involves what is referred to in the law as a reverse, or inverse, condemnation. Inverse condemnation is the term applied to a suit against a government to recover the fair market value of property which has in effect been taken and appropriated by the activities of the government when no eminent domain proceedings are used. The United States Supreme Court has been unable to develop any definite guidelines for determining when the best interests of justice require compensation for property taken. *See Penn Central Transportation Co.* v. *New York*

City, 438 U. S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). That court, however, has identified several factors which are relevant to ascertaining whether an act amounts to a taking. Such elements are (1) the economic impact of the law on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, (3) the "character" of the governmental action, that is whether the action is a physical invasion versus a public program adjusting the benefits and burdens of economic life to promote the common good, (4) what uses the regulation permits, (5) that the inclusion of the protected property was not arbitrary or unreasonable, and (6) that judicial review of the agency decision was available.

In Kentucky, the Wild Rivers Act, if it had been fully executed, could have been a taking. Stearns used the area for access and presuming a showing that the present access was inadequate, the company would have been cut off from the coal because no new roads could be built. No mining was allowed and Stearns was not permitted to clear-cut timber. These prohibitions would greatly interfere with the company's operation and impair its financial interests. The land had to remain practically untouched and in a primitive natural state. Here even though the law gave authority for such action by the state, there was no enforcement which deprived Stearns of any valuable right. The only attempts at enforcement were totally thwarted by judicial intervention. Consequently, there was no taking.

The evidence that signs were posted welcoming the public to the Stearns property indicates that a valid action based on trespass might have been pursued by Stearns. KRS 381.231. It seems this behavior by the Commonwealth was improper, and injunctive relief could have been the appropriate remedy under this situation. *Keck* v. *Hafley,* Ky., 237 S. W. 2d 527 (1951).

The authorities used by Stearns to support its contention that a taking had occurred are distinguishable. In *Pennsylvania Coal Company* v. *Mahon,* 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922), a landowner sought and obtained an injunction against Pennsylvania Coal which, pursuant to a statute, prevented the company from mining coal under the land. Contrary to our situation, the coal company was actually prevented from mining. *Hughes* v. *Washington,* 389 U. S. 290, 19 L. Ed. 2d 530, 88 S. Ct. 438 (1967), dealt with Federal law controlling who had title to accretion of land caused by the oceans. No taking issue was discussed in the main opinion. This case is really not relevant authority. *Davis* v. *Newton Coal,* 267 U. S. 292, 45 S. Ct. 305, 69 L. Ed. 617 (1925), is factually distinguishable because the Federal government, acting through the fuel administration, actually seized 113 railroad cars of coal.

In other cases, when serious questions concerning government action were presented, the landowner was subjected to more abusive government intervention than here. In *United States* v. *Causby,* 328 U. S. 256, 90 L. Ed. 1206, 66 S. Ct. 1062 (1946), the U. S. Supreme Court held there was a taking because airplanes flew so low from an adjacent military airfield that the land became uninhabitable. In *Penn Central, supra,* the court held there was no taking when the landowner was prohibited from building an addition to Grand Central Station. The conduct in our case, although arbitrary, does not rise to a legal taking. A careful examination of the authorities presented by all parties to this action indicates that a majority of the decisions involving an inverse taking involve acts which completely frustrate the landowner's rights and deprive him of the use of his property. That is not the situation here.

The original law itself is reasonable and the purpose of the law is within the overall scope of a public purpose. *See, Moore* v. *Ward,* Ky., 377 S. W. 2d 881 (1964). The

valid exercise of police power which may result in expense or loss of property is not a taking of property without just compensation. *Blancett* v. *Montgomery,* Ky., 398 S. W. 2d 877 (1966).

It should be noted that the police power is limited as stated in *Pennsylvania Coal Co.* v. *Mahon, supra.* The regulation is authorized only if it does not go too far, then it will be recognized as a taking. The strong public desire to improve society is not enough to avoid the payment to property owners who are deprived of their property. The valid exercise of police power is not unconstitutional merely because it deprives a property owner of the most beneficial use of the property. *Goldblatt* v. *Town of Hemstead,* 369 U. S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962).

Here the evidence is very strong that Stearns has made substantial beneficial use of the property. During the period of the alleged taking, there have been continued timber operations, a 5-year oil lease on over 9,000 acres, a 10-year lease to the Commonwealth of 10,000 acres for public hunting and wildlife management. A lease of 37,000 acres to the Western Reserve Oil Company, and extensive logging operations. Stearns has not suffered an excessive interference with the legally protected use of the land that has been generally designated as a Wild River area, and the land has not been destroyed nor has an additional burden been placed upon the maintenance of that use.

The sale of 12,000 acres by Stearns to the United States was relevant and material to the possible set-off against any judgment awarded to Stearns. Stearns had already been paid approximately $5.6 million for part of the land in question by the Federal government in 1978, nearly three years prior to the final judgment. The state could never acquire any interest in lands conveyed to the United States because a state cannot take by eminent domain land owned

by the United States for governmental purposes. The Federal government does not have to comply with the Wild Rivers Act. Consequently the government did not suffer any damages nor was the sale inhibited. Stearns cannot reasonably argue that the sale price was diminished as a result of the existence of the Wild Rivers Act.

The award of prejudgment and post-judgment interest based on KRS 360.040 was clearly erroneous. *Department of Transportation* v. *Lamb,* Ky., 549 S. W. 2d 504 (1976). This judgment under an inverse condemnation proceeding does not bring the case within the rules on interest pursuant to an exercise of the power of eminent domain. At no time prior to or during the pendency of this action was Stearns out of possession or control of the property. There was no physical taking of the land. Unless and until the condemning authority takes possession of the property, the condemnee is not entitled to interest. *Foster* v. *Sanders,* Ky. App., 557 S. W. 2d 205 (1977).

We have not found a single inverse condemnation case from any jurisdiction, including Kentucky, which supports an award of interest against a government.

The trial judge's decision to charge the Commonwealth court costs is reversed only because we have determined there was no taking. The assessment of court costs against the condemning authority is constitutionally necessary in order to insure that complete and just compensation is received by the property owner. *Barker* v. *Lannert,* 310 Ky. 843, 222 S. W. 2d 659 (1949), holds that court costs in any part of a condemnation proceeding cannot be assessed against the individual property owner because such an expense would reduce the just compensation paid and consequently violate Section 242 of the Kentucky Constitution. Inverse condemnations must be treated in the same fashion as a straight condemnation by eminent domain under our constitution. *Keck* v. *Hafley, supra.* Here the property

owner brought the suit as an inverse condemnation. Our decision that there was no taking requires the property owner to bear his own costs.

The argument by the Commonwealth that unless it consents to the assessment of costs it cannot be required to pay such costs is unconvincing. Usually the costs in a condemnation proceeding whether it be inverse or by eminent domain do not mean mere filing fees, but rather involve expensive expert witnesses' charges which are necessarily occasioned by the government's actions. The decision in *Department of Revenue* v. *D & W Auto Supply, Inc.*, Ky. App., 614 S. W. 2d 542 (1981) and *Department of Human Resources* v. *Paulson*, Ky. App., 622 S. W. 2d 508 (1981), can be reconciled to the extent that court costs may be charged against the state as permitted by law. That portion of *D & W Auto Supply, supra*, which indicates that the Commonwealth is authorized to pay costs only if it agrees to do so is overruled because it conflicts with Section 242 of the Kentucky Constitution and the decision in *Barker, supra*. This situation is controlled by *Barker*, and the Commonwealth must pay costs when a taking occurs either in eminent domain proceedings or an inverse condemnation proceeding. In this case, because we have determined that there was no taking, costs should not have been assessed against the Commonwealth. To the extent that KRS 453.010 conflicts with Section 242 of the Kentucky Constitution, the statute is invalid.

We have fully considered the other voluminous arguments presented here, but in view of our decision, there is no reason to review them at this time. The 1976 amendments are not subject to review in this case because they did not become effective until June 19, 1976, several months after the filing of this suit.

It is the holding of this Court that the passage of the Wild Rivers Act and the conduct of the Commonwealth in

attempting to enforce its provisions, did not constitute a legally compensable taking of the property of Stearns by inverse or reverse condemnation. The judgment of the trial court is reversed.

Stephens, C.J., Gant, Vance and Wintersheimer, JJ., concur. Aker, Leibson and Stephenson, JJ. dissent. Leibson and Stephenson, JJ., dissent by separate opinions. Aker, J., joins in Stephenson's dissent.

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SUPREME COURT OF KENTUCKY

83-SC-183-TG
83-SC-78-TG
(Consolidated with 82-SC-279-TG)

COMMONWEALTH OF KENTUCKY, NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET - - - - *Appellant/ Cross-Appellee*

v.

STEARNS COAL AND LUMBER COMPANY - - *Appellee/ Cross-Appellant*

Appeal from McCreary Circuit Court
Hon. J. B. Johnson, Jr., Judge
Civil Action No. 2994

DISSENTING OPINION BY JUSTICE LEIBSON

Respectfully, I dissent. The decision to deny the Stearns Company just compensation for the taking of its property is a miscarriage of justice, an indefensible injury to this property owner and, as a precedent, a serious threat of the abuse of state power against all property owners.

It is an inescapable fact that the Kentucky Wild Rivers Act, both as originally enacted in 1972 and as reenacted in 1976, substantially deprives Stearns of the commercial use of its property for the benefit of the general public, resulting in a significant diminution in the value of the property. I see no difference between this taking and any other taking for a public easement. A property owner continues to

hold fee simple, but has lost many of the rights that were a concomitant of such ownership.

The only question is whether the taking should be classified as an inverse condemnation or an exercise of the state's police power. Both the nature of the taking and the Act itself answer this question in Stearns' favor:

> "Nothing in KRS 146.200 to 146.360 shall be construed to deprive a landowner of the fee simple title to or lesser interest in his property without just compensation." KRS 146.280(1)

As Justice Palmore said in his concurring opinion in *Commonwealth ex. rel. D.N.R. and E.P.* v. *Stephens,* Ky., 539 S. W. 2d 303, 309 (1976), speaking of the 1972 Act:

> "The restrictions contained in KRS 146.290, though probably intended to become effective upon designation of the boundaries pursuant to KRS 146.250, so substantially reduce the owners' private property rights that they (the restrictions) exceed the traditional scope of the police power and therefore cannot take effect unless and until the owners are paid just compensation for the loss of those rights."

As Justice Jones said in his dissenting opinion in the same case:

> "The legislative scheme to preserve the beauty in the designated areas was never intended to be accomplished by imposing the burden of the cost and a restriction of use on the owners of property within the designated area." *Id.* at 310.

Stephens, supra, answers the question "whether the police power of the state could be stretched so as to destroy previously existing rights of property and contract" in the area covered by the Wild Rivers Act. It holds that

the police power of the state does not extend to cover the taking contemplated by the Act. It adopts as the applicable principle the following language from *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922): "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. ***We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.***"

The 1976 amendment to the Wild Rivers Act does not change the essential character of the Act. It remains a use of private property for public benefit in a manner that prevents commercial use of the property. As shown by the facts in this case, the section of the Act authorizing permits for commercial use is largely illusory. Strip mining of coal is still completely prohibited. Deep mining will be in direct conflict with the Act since it is clear that no management plan permitting it would be "consistent with the purposes of the Act."

In fact, no management plan has been developed under which to apply. Secretary Bell of the Department for Natural Resources and Environmental Protection testified in his deposition on June 24, 1977 that he would not allow deep mining or strip mining or road building or construction of buildings in a Wild Rivers area. Since Secretary Bell knew that his Department had been sued for twenty million dollars when he testified, his testimony must be given great weight.

The action by the Department in printing brochures inviting public use, putting up signs and surveying the area effectively deprived the owner of commercial use of this property. It is true that the boundaries of the area were not "officially" designated by the Department until

July 21, 1976, after the 1976 amendment which purports to allow a system of permits, and that *Stephens, supra,* refers to the 1972 Act as enabling rather than confiscatory until such time as these boundaries have been officially designated.

The majority opinion states, "This Court held (in *Stephens*) that these maps did not meet the statutory requirement of designating the boundaries." Actually, it appears from the decision in *Stephens* that in that case *both* sides "advised (the Court) that the Secretary for the Department for Natural Resources has not as yet determined the boundaries of the stream area of the location with which we are concerned." 539 S. W. 2d 308. Further, the opinion states:

> "The landowners' motion to dismiss called to the trial court's attention the fact that no boundary designation had been made . . ." 539 S. W. 2d 308.

The opinion in *Stephens* seems to proceed unaware that a designation had in fact taken place, that all that remained was the official imprimatur.

We should not decide this case on any point so transparently hypocritical as the cosmetic changes effected by the 1976 Act. The trial court reached through the facade to the operative facts in this case and we should do the same. The acts of the Department preparatory to officially designating the area from which commercial use was prohibited and in taking control of the property for public use went much too far to be ignored. The majority opinion designates posting signs inviting public use as "improper," but not evidence of a taking. I deem it confiscatory.

The majority concludes that "(t)he conduct (of the state officials and employees) in our case, although arbitrary, does not rise to a taking." These officials and employees were not arbitrary. They were simply carrying

out their responsibilities as the Act permitted and as assigned to them. In doing so they were creating a public easement on Stearns' property for which Stearns was entitled to just compensation. The then Secretary for the Department of Natural Resources and Environmental Protection testified that his "concept" of carrying out the Act was "freezing" all commercial activity with the Wild Rivers area indefinitely without compensating private owners.

The sale of a portion of that property to the Federal government was presumably a sale at its fair market value, as diminished in view of the Wild Rivers Act as now in place. It is not necessary that the state "*completely* frustrate the landowner's rights and deprive him of the use of his property," as written in the majority opinion, before the landowner is entitled to compensation. He is entitled to such compensation when the state *partially* frustrates his rights and deprives him of the use of his property, to the extent he has been deprived.

As stated by the trial court in deciding this case:

> "In essence, there comes a time when the interference and control by government of private property has existed for such a period of time that fairness and justice require that government pay for the damages to that property rather than be permitted to decide, unilaterally, that the price for its actions is too high." Memorandum Opinion, J. B. Johnson, Jr., Judge, McCreary Circuit Court.

Following this decision the trial court was asked to "select a specific date of the taking." See Pre-trial Order, J. B. Johnson, Jr., Judge, McCreary Circuit Court, dated October 20, 1981. The trial court then held:

> "Upon consideration of the arguments of both parties, it is the opinion of the Court that while selecting the date of the taking is somewhat artificial, it would ap-

pear from the facts that were proved on the liability aspect of this case that the full impact of the enforcement of the Wild Rivers Act had culminated at least by June 25, 1975, the date the Commonwealth enjoined Western Reserves, a lessee of Stearns from drilling gas wells or from engaging in any other activities within the boundaries of the Rock Creek Wild River. Thus, the Court finds that the date of the taking for the purposes of the trial on damages is June 25, 1975."

The decision of the trial court was well reasoned and in conformity with the law. We should affirm.

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SUPREME COURT OF KENTUCKY

83-SC-183-TG
83-SC-78-TG
(Consolidated with 82-SC-279-TG)

COMMONWEALTH OF KENTUCKY, NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET - - - - - *Appellant/ Cross-Appellee*

v.

STEARNS COAL AND LUMBER COMPANY - - *Appellee/ Cross-Appellant*

Appeal from McCreary Circuit Court
Honorable J. B. Johnson, Jr., Judge
Civil Action No. 2994

DISSENTING OPINION BY JUSTICE STEPHENSON

I dissent from so much of the majority opinion as reverses the entire case and effectively dismisses the complaint. Without going into detail, I am of the opinion there are portions of the surface and minerals that were taken by the Commonwealth of Kentucky. I would not reverse the entire case. Aker, J., joins in this dissent.

APPENDIX 2A

McCREARY CIRCUIT COURT

No. 2994

STEARNS COAL AND LUMBER COMPANY, INC.

and

KENTUCKY AND TENNESSEE RAILWAY - - *Plaintiffs*

and

WESTERN RESERVES OIL COMPANY - *Intervening Plaintiff*

v.

COMMONWEALTH OF KENTUCKY
DEPARTMENT FOR NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION - - - *Defendant*

MEMORANDUM OPINION

This inverse condemnation action is submitted to the Court on motions for Summary Judgment by Plaintiffs, Stearns Coal and Lumber Company, Inc. and Kentucky and Tennessee Railway; Intervening Plaintiff, Western Reserves Oil Company; and Defendant, Commonwealth of Kentucky, Department for Natural Resources and Environmental Protection on the basis of the pleadings filed herein, evidence taken by way of depositions with exhibits, answers to interrogatories, and on extensive briefs and oral arguments of the parties. It involves the passage and enforcement of the Kentucky Wild Rivers Act (KRS 146.200 *et seq.*).

The Wild Rivers Act was enacted in 1972, effective June 16, 1972. The purpose of the Wild Rivers Act was to

preserve certain streams in Kentucky in their natural state "free from evidence of the works of man," by preventing any further commercial development in and around those streams. In 1974, the Legislature added three additional streams to the Wild Rivers program. At the time the lawsuit was originally filed (and until August, 1979), the Plaintiff, Stearns, owned fee simple title to the surface of or had a mineral interest in approximately 2,237 acres within the Big South Fork Wild River, which was included in the original legislation in 1972, and some 12,000 acres in the Big South Fork watershed. The acreage within the Big South Fork Wild River and certain acreage in the watershed has now been conveyed to the United States of America to be preserved in its natural state as a National Park and Recreational area as evidenced by the Second Amended and Supplemental Complaint filed herein. Stearns still owns various interests in 5,918 acres within the Rock Creek Wild River, which was added to the Wild Rivers legislation in 1974. The Plaintiff, K & T, owns a fee simple strip of land along the Rock Creek Wild River. Likewise Stearns still owns various interests in approximately 11,693 acres of land in the watershed of Rock Creek both on the East and West sides of Rock Creek. Intervening Plaintiff was a lessee of the Plaintiff, Stearns, with the right to drill for oil and gas at all times described herein. This action is appropriate for summary judgment because the material facts are undisputed. The parties are in agreement that the question of whether the state has effected a "taking" is a question of law for this Court to decide.

The Act delegated the responsibility for administration and enforcement of the Wild Rivers program to the Department for Natural Resources. KRS 146.270. While the original Act (KRS 146.240) established five Wild Rivers and partially established the boundaries by stating that the boundaries include "at least the visual horizon from the

stream, but not more than 2,500 feet from the center of the stream" (KRS 146.250), the Act also directed the Secretary of the Department to "determine generally the boundaries of the stream area" (KRS 146.250).

The deposition of Douglas C. Griffin, Chief Engineer within the Division of Water in the Department, established that appropriate and detailed maps were prepared which did establish the boundaries for the five original wild rivers. Similar maps for the three additional streams including Rock Creek were completed by June 25, 1974. Copies of these detailed maps are in the record and the evidence is uncontradicted that they were extensively used by the Department in administering the Wild Rivers Act, and particularly for locating the stream areas and determining whether "prohibited" activities were being conducted within or without the wild river area. Mr. Wendell VanHoose, who was given the initial responsibility for implementing the Wild Rivers Act, testified by deposition that these maps "determined generally" the boundaries of all Kentucky Wild Rivers as required by KRS 146.250. Likewise, the depositions of Secretary Hoffman and his successor, Secretary Bell, made it clear that by use of these maps the boundaries of all the wild rivers were ascertainable by June, 1974, and further, the Department felt that it had fulfilled its statutory obligation to determine the boundaries.

By the fall of 1973, Wendell VanHoose prepared a one page summary of the Wild Rivers Act which he used in enforcing the Act. He circulated this summary to the public. The memorandum listed prohibited activities as including construction of new roads or buildings, all mining, all land disturbances, including in-stream disturbances, and the presence of motorized vehicles either on land or water. The record clearly establishes that the Department's intention to prohibit all of the above activities was

widely circulated throughout the state by the *Courier-Journal* and other media sources as well as by officials of the Department. Likewise, a widely publicized opinion by the Attorney General of Kentucky indicated that the above listed prohibitions were indeed in effect in Kentucky as of the date of passage of the Wild Rivers Act.

The record further establishes that Wendell VanHoose inspected all of the Wild Rivers, that he circulated the above memorandum and maps, when he was asked for them, and he caused to be erected signs at the beginning and the end point of each stream and numerous other signs at mid-points along the streams. A number of these signs were erected on Plaintiff, Stearns', property. The signs advised the public that the stream referred to was in the Kentucky Wild Rivers System and was being protected by the State of Kentucky. The Department circulated numerous brochures which invited members of the public to canoe and otherwise utilize the streams and in some instances invited the public to "put in" and "take out" at various points on private property, inrlhding property of Plaintiff, Stearns.

Likewise, on November 1, 1974, the Department obtained an injunction against Morris Stephens enjoining him from cutting trees upon his own private property within the boundaries of the Cumberland Wild River (above Cumberland Falls) upon which he intended to erect a commercial building. Subsequently, on June 25, 1975, the Department obtained an additional injunction against Western Reserves Oil Company, a lessee of Plaintiff, Stearns, enjoining it from drilling or exploring for gas and oil. Thus, the record establishes that wherever private commercial activities were attempted within the boundaries of the various wild rivers, they were effectively halted by injunctions, or in some cases where injunctions were not required by demanding that offenders leave the area.

Interestingly, during the years 1973, 1974 and 1975, private landowners were being told by officials of the Department, directly and through the media, that the Department was not attempting to take away private property rights without compensation, but rather than they would ultimately be paid. This was consistent with the opinion of the Attorney General which stated that the various restrictions on the property were in effect, but noted that nothing in the Wild Rivers Act "shall be construed to deprive the landowner of his property or any interest or right therein without just compensation" (KRS 146.280). Yet, the testimony of Secretary Hoffman also establishes that while the Department publicly allowed the news media and the public to believe that it intended to acquire any interests taken by enforcement of the Wild Rivers Act by payment of compensation, it was never the policy of the Department at any time to initiate condemnation proceedings or to negotiate for the purchase of the interests taken. The record clearly establishes that it was the public posture of the Department during this entire period that landowners would be compensated for any damages which they incurred as a result of the prohibitions which had been put into effect by the Department. This view of the matter was even stated by attorneys for the Department in briefs filed on January 20, 1975, in the Franklin Circuit Court in response to Morris Stephens' contention that the state's injunction was illegal.

To summarize during the years 1973-1975, the Department had forcefully and effectively halted or frozen all commercial activity within Kentucky's Wild Rivers including the prohibition of mining, timbering, road building and other commercial development, while publicly stating that the law provided and the Department intended to ultimately compensate the landowners for the obvious damage (loss of market value of the property) which would occur.

The record also establishes that during the years 1974-1975 there was a coal boom which caused a substantial increase in the value of coal lands and royalties for strip and deep mining of coal. The uncontradicted testimony of Robert Gable, President of Stearns, established that while Stearns had many inquiries about the availability of its coal for lease or for sale, Stearns was unable to lease or sell its coal because of the constraints of the Wild Rivers Act. The testimony of Mr. Gable also established that area property values jumped to levels of $300 per acre for mineral rights and over $700 per acre for both mineral and surface during this period, but that the property affected by the Wild Rivers Act had very little value for commercial use because of the passage and enforcement of the Wild Rivers Act.

It was not until August of 1975 that the Wild Rivers Act was first construed by the Courts. In *Stevens* v. *Com., ex rel. D.N.R. & E.P.,* No. 85519 in the Franklin Circuit Court, the Department was put on notice that it could not indefinitely "freeze" Wild Rivers areas without moving forward with condemnation proceedings.

In early 1976, the Governor of Kentucky and various legislators were quoted in the news media as advocating legislation which would reduce the restrictions then in effect on private property. There is a dispute in the testimony as to whether this effort was a bad faith effort to confiscate the property by appearing to change the restrictions to tolerate levels or whether it was a good faith effort to allow substantial commercial activity to occur on the private property affected. The Court does not need to resolve this conflict on the question of the motive of the legislation in view of the fact that while KRS 146.290, as revised, did contain a "permitting section," the evidence showed that the Revised Act was enforced in exactly the same manner as the old Act. Further, all strip mining

(perhaps the most valuable right) was still outlawed under the Wild Rivers Act. While the amendment to the Act purported to allow certain kinds of deep mining and timbering, the circumstances under which it could be done were not set out in the legislation. The section (KRS 146.290 (2)) also provided that all activities would only be allowed pursuant to regulation promulgated by the Secretary pursuant to a management plan. This record shows that no such plan has ever been adopted nor have any regulations for deep mining or timbering or any other activity been promulgated. It is impossible for the Court and more importantly, landowner, to understand by what standards (other than subjective) any request for a permit would be judged. Furthermore, the Act as revised retained strong language guaranteeing compensation for any interest in private property taken away.

Moreover, despite enactment of the permitting section, Secretary Bell testified (on June 24, 1977) that it continued to be the policy of the Department to prohibit all commercial activity in the Wild Rivers areas, including timbering, deep mining, construction of roads, homes, or recreational facilities, and other like activities.

Based on the above facts, it is the contention of Plaintiffs that, during the years 1973 through 1975, the passage of the Wild Rivers Act plus the actions of the officials of the Department, acting on behalf of the State of Kentucky, effected a taking of those large areas of Stearns property where all commercial activity was effectively prohibited. To the contrary, it is the position of the Commonwealth that the actions of the Commonwealth are within the police power authority of the State to regulate private property and that in any event the instant case should be governed by the Wild Rivers Act as amended effective June, 1976, and subsequently enforced and should not be judged in the

light of the actions which the Commonwealth took during the years 1973 through 1975.

At the outset, the Court concludes that preparation of detailed topographic maps by Douglas C. Griffin and the use of those maps to enforce the restrictions of the Act adequately complied with the requirement that the Secretary "determine generally the boundaries of the stream area" set out in KRS 146.250. Thus this case is different from *Commonwealth* v. *Stephens,* Ky., 539 S. W. 2d 303 (1976), where there apparently was no such evidence in the record.

The *Stephens* opinion is nevertheless ample authority for this Court to determine that enforcement of the provisions of the Wild Rivers Act constitutes a taking of private property. In *Morris Stephens, supra,* Justice Sternberg stated that "if [the Act] is self-executing, then the Legislature itself has make a taking, has designated the land use, and has attempted to provide for deferred payment . . . To hold the Act as self-executing would violate Section 13 of the Kentucky Constitution, notwithstanding KRS 146.-290."

However, on this record, it is clear that the boundaries were determined in accordance with the mandate of the Act, and further, the officials of the State of Kentucky left no doubt that the prohibitions of the Act were in effect in specified areas within the boundaries of all Wild Rivers so determined.

Since the Supreme Court has already construed the prohibitions contained in the statute to be sufficiently broad and restrictive to constitute a taking, the obvious *enforcement* of these restrictions by the Commonwealth for a period of three years alone is more than ample to establish that the Commonwealth did indeed "take" the property of Plaintiffs in 1975. It is also the opinion of the Court that the Plaintiffs have adequately established that the pro-

hibitions put into effect by the Commonwealth did place a substantial burden on Plaintiffs' land within the meaning of the constitutional test for determining what constitutes a taking of property as stated in *Commonwealth* v. *Kelley,* Ky., 236 S. W. 2d 695 (1951), wherein the Court relying on Section 13 and 242 of the Kentucky Constitution stated: "an interference with the legally protected use to which land has been dedicated, which destroys that use or places a substantial and additional burden on the landowners to maintain that use is a 'taking' of his property." This is substantially the test articulated by the Supreme Court of the United States in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 67 L. Ed. 322, 43 S. Ct. 158 (1922).

Simply stated, the rights to strip mine and deep mine coal, and the rights to cut timber and to build roads and construct commercial facilities, are all valuable rights which were entirely taken away from Plaintiffs for an extended period of time without any intention to make a payment, although the Department led private landowners to believe that payment would be forthcoming for such an extended period of time that the only reasonable remedy was this inverse condemnation action for damages. While the dollar amount of damages suffered by Plaintiffs will be determined in a subsequent phase of the case, the Court has no doubt that this record establishes without contradiction that valuable rights of the Plaintiffs were taken away and that the acts of the Commonwealth resulted in the substantial destruction of the Plaintiffs' rights to use its property for legitimate and lawful commercial purposes. These actions of the Commonwealth constitute an unlawful taking under both the Kentucky and United States Constitutions.

In reaching this decision, the Court is not unmindful of the recent decision by the Supreme Court of the United States entitled *Penn Central Transp. Co.* v. *City of New York,* 438 U. S. 104, 57 L. Ed. 631, 98 S. Ct. 2646 (1978).

However, in the *Penn Central* case, the Supreme Court did not abandon the law that a substantial interference with private property is a taking, but rather, the Supreme Court found that the owners of the Penn Central were still permitted to make the same uses of the Penn Central building as had been made for more than half a century, and that they had not shown that they could not earn a reasonable return on their investment. In addition, compensation was provided to the landowner in the form of transferable development rights. To the contrary, this record shows that if Stearns is unable to lease its land for deep or strip mining, or for oil and gas drilling, or for timbering, it has virtually no practical method of generating revenue, rather, it would simply be in a position of paying taxes on land so the public could enjoy it.

It is also the opinion of the Court that the Wild Rivers Act by its own terms intended to compensate a landowner for "any interest" which was taken away from him by application of the Act. KRS 146.280 states: "Nothing in KRS 146.000 - KRS 146.350 shall be construed to deprive a landowner of his property or any interest or right therein without just compensation." This provision of the statute was construed by the Supreme Court in *Morris Stephens, supra,* leaving it undisputed that this legislation never intended to rely on police powers of the state to regulate private property, without payment for resulting damage, nor to zone private property. To the contrary, the legislation intended to compensate private property owners for any interest taken away from them by the State in accordance with the legislation. Thus, it is the Court's view that the Commonwealth would be liable to Plaintiffs for damages for any interest taken by the Commonwealth from Plaintiffs, without regard for the question of whether such interests, when added together, would amount to a common law "taking."

The Commonwealth places great reliance on the permitting section to avoid the obvious consequences of its three year enforcement of the prohibitions contained in the Wild Rivers Act of 1972. The Commonwealth does not deny that even under the permitting section enacted in 1976, strip mining is still prohibited here. This Court can judicially notice that the ownership of coal capable of being strip mined in McCreary County is a valuable right. Furthermore, Stearns has clearly been deprived of that right. However, it is the opinion of this Court that the taking of this property occurred prior to the enactment of the permitting section, with the result that the rights of these litigants were already set, and the taking had occurred before the permitting section went into effect.

Equally important, the Secretary of the Department testified in this action that it continued to be the policy of the Department to prohibit not only strip mining but deep mining and timbering and other commercial development even after the permitting section was passed. This policy of the Department is buttressed by the failure of the Department to promulgate a management plan in accordance with which permits could be granted. In the absence of any management plan or any regulations for the issuing of permits, there are not at this time any standards by which the Department could authorize deep mining or timbering within the boundaries of a Wild River. In essence, while the legislature has passed a statute which contemplates, permitting, the Department has failed to implement the permitting section with the result that, as far as the private landowner is concerned, there is no established permitting process and, therefore, nothing has changed.

Although it is not necessary for this decision, the Court is of the further opinion that the permitting section constitutes an excessive, improper and unlawful delegation of power to the Department, because the statute does not con-

tain the required standards to prevent abuses of power. Further, it is the view of this Court, as argued by Plaintiffs, that the activities described in the permitting section (deep mining, commercial development and construction of roads) are so contrary to the very purposes of the Wild Rivers legislation that those sections are in irreconcilable conflict. This Court should give priority to that section of the statute that set out its basic purpose.

For all of these reasons, the Court is of the opinion that the enactment of the permitting section in 1976 has not altered the fact that the Commonwealth has "taken" Plaintiffs' property without first paying them compensation as required by the Constitutions of Kentucky and the United States.

Likewise, the Commonwealth has argued that the sale in August, 1979, by plaintiff, Stearns, to the United States of America of certain acreage within the Big South Fork Wild River and certain acreage in the watershed of the Big South Fork is proof that no taking of Plaintiffs' property occurred. The Court disagrees. As the Court has found, the passage of the Wild Rivers Act and the vigorous enforcement of that Act by the State of Kentucky in 1975 virtually destroyed the market value of said property at that time because the property could not then be used for any reasonable commercial purposes. The subsequent sale of the property by Stearns to the United States for *non-commercial* purposes (so that the property could remain as a natural wilderness area) is such a unique, unregulated and unpredictable event and it occurred so many years after the taking that said sale does not affect the question of whether there was a taking in 1975. It is the view of the Court that if the sale has relevance, it relates solely to the issue of damages for which the Commonwealth shall ultimately be liable to Plaintiffs. In this connection, all questions relating to the before and after market values of

lands taken as well as all other matters relating to damages will be the subject of expert proof which will be developed in the second phase of this case as previously determined by the Court and in accordance with specific guidelines to be established in pre-trial conferences hereafter. At that time the Commonwealth will have ample opportunity to advance any arguments it may have concerning the effect, if any, the sale may have on the damages aspect of this case.

Finally, the Court concludes that the above-described "taking" is permanent. A number of factors support this conclusion. First, the Wild Rivers Act has, in effect, reclassified the areas affected as wilderness areas which will be preserved in their natural state. An outright repeal of the legislation and the lifting of all restrictions at this date would not restore this property to market values it would have had but for the actions of the Commonwealth. Moreover, to date, there is no showing that the Commonwealth has lifted the restrictions which it has imposed upon private property owners within the boundaries of the Wild Rivers. In any event, these restrictions have not been lifted within any reasonable time with the result that private property owners lost the opportunity to make use of their property at a critical time when it was economically feasible for them to do so.

To characterize this "taking" as temporary, would sanction any government scheme for the complete prohibition of any productive activity on private property for a period of five or six years on the erroneous assumption that the loss to most owners could somehow be calculated. No one, including Plaintiffs, could now state what valuable sales, what leases, or what actual development could have been undertaken by Plaintiffs but for the almost total restrictions placed upon their property by the actions of the Department in enforcing the restrictions of the Wild Rivers

Act. In essence, there comes a time when the interference and control by government of private property has existed for such a period of time that fairness and justice require that government pay for the damages to that property rather than be permitted to decide, unilaterally, that the price for its actions is too high.

In light of the above opinion, the Court believes that Plaintiffs and Intervening Plaintiff are entitled to Summary Judgment on the question of the liability of the Defendant to all Plaintiffs. A Summary Judgment has this day been entered in accordance with this opinion.

January 30, 1981

(s) J. B. Johnson, Jr.
Judge, McCreary Circuit Court

APPENDIX 2B

McCREARY CIRCUIT COURT

Civil Action No. 2994

STEARNS COAL AND LUMBER COMPANY, INC.

and

KENTUCKY AND TENNESSEE RAILWAY - - *Plaintiffs*

and

WESTERN RESERVES OIL COMPANY - *Intervening Plaintiff*

v.

COMMONWEALTH OF KENTUCKY
DEPARTMENT FOR NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION - - - *Defendant*

SUMMARY JUDGMENT

This matter having been submitted to the Court on motions for Summary Judgment by plaintiffs, Stearns Coal and Lumber Company, Inc. and Kentucky and Tennessee Railway; intervening plaintiff, Western Reserves Oil Company; and defendant Commonwealth of Kentucky, Department for Natural Resources and Environmental Protection; and the Court having considered the pleadings, the evidence taken by way of depositions with exhibits, the answers to interrogatories, and the briefs and oral arguments of the parties, it is ordered:

(1) The motion for summary judgment on behalf of Stearns Coal and Lumber Company, Inc., Kentucky and Tennessee Railway and Western Reserves Oil Company is granted on the issue of liability and judgment is hereby

rendered in favor of Stearns Coal and Lumber Company, Inc. and Kentucky and Tennessee Railway and Western Reserves Oil Company and against Commonwealth of Kentucky, Department for Natural Resources and Environmental Protection.

(2) The motion for summary judgment on behalf of the Commonwealth of Kentucky, Department for Natural Resources and Environmental Protection is denied.

(3) This summary judgment is entered in accordance with the Memorandum Opinion entered by the Court this date.

(4) This is an interlocutory judgment on the issue of liability alone and the matter is retained on the docket for determination of damages.

(s) J. B. Johnson, Jr.
Judge

January 30, 1981.
Date

APPENDIX 2C

McCREARY CIRCUIT COURT

Civil Action No. 2994

STEARNS COAL & LUMBER COMPANY, INC., - *Plaintiff,*

v.

COMMONWEALTH OF KENTUCKY,
DEPARTMENT FOR NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION, - - *Defendant.*

JUDGMENT

This action having been brought on for trial on October 26, 1981, before Judge J. B. Johnson, Jr., in the McCreary Circuit Court, and the parties hereto having appeared by and through their respective attorneys and the Court having ordered the issue of damages to be tried by a jury and said issue having been tried and submitted to the jury, and the verdict of the jury thereon having been returned on November 12, 1981, and recorded as follows:

> We the jury agree and find from the evidence as follows:
>
> A. The fair market value of Stearns' property as a whole immediately before June 25, 1975 ..... *$11.2 million*
>
> B. The fair market value of Stearns' property after June 25, 1975 ..... *$4.5 million*
>
> C. The difference between A and B, which sum we award as compensation for the property taken ..... *$6.7 million*

On the subsequent motion of Plaintiff, Stearns Coal & Lumber Co., Inc., by counsel, for the adoption of this Court of the verdict of the jury and its findings, for judgment in accordance therewith, and for interest at a reasonable rate upon the damages awarded by the jury from the date of the taking, June 15, 1975, and for interest on the Judgment from the date of its entry, and counsel for the defendant having objected to any interest being awarded, and having further moved the Court for a deed and a setoff of $5,613,-434.00 against the amount of the jury verdict, and the motions having been fully argued and submitted to the Court, and the Court having considered various affidavits and being otherwise fully advised,

IT IS HEREBY ORDERED:

1. That the verdict and findings of the jury be, and the same are, adopted by the Court as its findings and conclusions.

2. That Summary Judgment and Memorandum opinion previously entered by the Court on January 30, 1981, are made a part of this Judgment.

3. The Opinion, entered upon this date, ruling upon the post-verdict motions is adopted and made a part of this Judgment.

4. That the plaintiff is awarded and shall recover from the defendant the sum of $6,700,000.00, with interest at the rate of six (6%) percent from June 25, 1975 until June 19, 1978, and thereafter at the rate of eight (8%) percent per annum until paid.

5. That the costs of this action be paid by the defendant.

6. Pursuant to CR 54.02, the Court finds that there is no just reason for delay and this is a final judgment.

This the 19th day of January, 1982.

(s) J. B. Johnson, Jr.
Judge, McCreary Circuit Court

Distribution To:

Hon. Winfrey P. Blackburn, Jr.
Hon. Ronald D. Ray
Hon. Mark E. Gormley
Hon. Alan L. Harrington
Hon. Arthur Williams

APPENDIX 2D

McCREARY CIRCUIT COURT

Civil Action No. 2994

STEARNS COAL & LUMBER COMPANY, INC., - *Plaintiff,*

v.

COMMONWEALTH OF KENTUCKY,
DEPARTMENT FOR NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION, - - *Defendant.*

OPINION

This is a reverse condemnation action in which the trial, upon the issue of damages, resulted in a jury verdict of $6,700,000.00 as compensation for the property taken by the defendant. The matter is now pending upon certain post-verdict motions, which the Court will briefly discuss.

Plaintiff first contends that it is entitled to interest from the date of the taking, June 25, 1975. Defendant contends that plaintiff is entitled to neither pre-judgment nor judgment interest, citing *Bankers Bond Co.* v. *Buckingham,* 265 Ky. 712, 97 S. W. 2d 596 (1936).

The *Bankers Bond* case was neither a condemnation nor a reverse condemnation action. It simply holds that the Commonwealth may not be held to the payment of interest on a public debt. In a much more recent opinion, and one involving condemnation, the Court of Appeals pointed out that Kentucky's constitutional requirements are consistent with the general rule allowing interest coincident with the date of taking. *Foster* v. *Sanders,* Ky. App., 557 S. W. 2d 205, 208-209 (1977). That well reasoned opinion cites many cases and annotations supporting this rule, including 3

Nichols' The Law of Eminent Domain, Section 8.63 (3rd ed. 1976). Also see *Commonwealth, Department of Highways* v. *Young,* Ky., 380 S. W. 2d 239 (1964). In this Court's opinion, these authorities are dispositive of this issue.

Secondly, plaintiff contends that it should not be limited to the interest rates provided by KRS 360.010 and 360.040. These statutory rates were 6% on the date of taking, but were increased to 8% by legislative changes which became effective on June 19, 1978.

Stearns argues that the statutory rates are unrealistic and "far below a reasonable rate of return in the commercial market." It thus concludes that, in order to be justly compensated, it is entitled to a reasonable rate of interest which, according to the average of its five expert affiants, would amount to 9.23%, compounded quarterly.

In support of its argument, Stearns has cited *Miller* v. *United States,* 620 F. 2d 812, 837-840 (U. S. Ct. of Claims, 1980) and *In the Matter of South Bronx Neighborhood Development Plan,* Sup., 442 N.Y.S. 869 (1981). The *Miller* opinion is well written and basically holds that the rate of interest to be applied in a condemnation case is a judicial function rather than a legislative one. The *South Bronx* opinion holds a municipal law unconstitutional which set a 6% limit on prejudgment interest in condemnation proceedings.

Although there is some logic to the plaintiff's argument, especially as enunciated in the *Miller* opinion, this Court is not so certain that the judiciary is better equipped to assess interest rates than is the legislative branch. For decades we have considered this a legislative function, and no case has been cited holding the Kentucky statutes to be unconstitutional. This case has been in the trial court for over five years and may be in the appellate courts for several more years. If, due to the recession or otherwise, interest rates should plummet during the ensuing months,

would it be necessary to hold new hearings to make certain that the judicially imposed rate did not then amount to greater than just compensation? But more importantly, this Court does not find the statutory rates to be confiscatory or unreasonable. Therefore, although the rates may be low as compared to today's prime rates, they are not so unreasonable as to be constitutionally impermissible.

The Commonwealth contends it is entitled to a deed to the areas found to have been taken. If it is serious about this motion, then it totally fails to understand the difference between an eminent domain proceeding and a reverse condemnation action.

In the former, the Commonwealth, acting pursuant to statute, is allowed to involuntarily acquire (for a public purpose) all or a portion of a property owner's land and, in return for the payment of just compensation, receives a deed to the land in controversy.

In the latter, the sovereign's *actions* are found to be a taking under section 13 and 242 of the Constitution of the Commonwealth of Kentucky. The State does not receive a deed or acquire title to the property, but is allowed to continue its actions to the continuing detriment of the landowner, who in turn is compensated for the damages which have been (and will continue to be) incurred. Title remains in the property owner, but his land will always be subject to damage by such future actions of the sovereign.

Our case law clearly does not require the delivery of a deed in a reverse condemnation case. See, e.g., *Commonwealth, Dept. of Highways* v. *Widner,* Ky., 388 S. W. 2d 583, 588 (1965).

Finally, the Commonwealth contends it is entitled to a setoff of $5,613,434.00 against the verdict of $6,700,000.00, "said setoff amount being a proportional amount of the proceeds received by Stearns for the sale of 12,277 acres of the subject matter of this litigation."

The sale in controversy was on August 1, 1979, from Stearns to the United States of America. It involved large acreage tracts located in both Kentucky and Tennessee. The 16,231.43 acres in Kentucky were conveyed for a consideration of $7,421,525. Of the total Kentucky acreage sold, 12,277 acres were within the 27,332 acres held to have been affected in this litigation. The Commonwealth uses "simple mathematics" and concludes that as Stearns "has already received $5,613,434 for 12, 277 affected acres, it is only logical to equitably reduce the $6,700,000 jury award by $5,613,434."

The Court concludes that the alleged setoff is neither logical nor equitable. In the first place, the "simple mathematics" which the Commonwealth urges the Court to accept are totally illogical. When dealing with real estate of this magnitude and diversity, especially when the nature of the ownership varies among mineral estates, surface ownership and fee, it is very impractical to resort to such simplistic computations. Other fallacies of the Commonwealth's contentions are illustrated in Stearns' response, and will not be parroted back in this opinion.

Secondly, the Commonwealth has cited no authority, nor has the Court found any, justifying the alleged setoff. It is thus apparent that it is not founded in either logic or the law.

Most importantly, it is clear that the negotiations between Stearns and the Corps of Engineers began years after the enactment of the Wild Rivers Act and long after the institution of this action. The United States of America was the only potential purchaser in the whole world who could buy this land and not be subject to the provisions of the Wild Rivers Act. Thus, prior to and throughout the negotiations between the Corps and Stearns, the parties were aware of and must have considered the weakened bargaining position of Stearns.

Stearns obviously was between the proverbial "rock and a hard place." That is, it could sell to the United States at a price much lower than it believed the property to be worth, or refuse and then be faced with the uncertainties of not only this litigation, but also the threatened condemnation suit by the federal government.

Stated differently, a fair consideration of the evidence convinces the Court that the reduction in fair market value of Stearns' properties (due to the passage and enforcement of the Wild Rivers Act) was in fact taken into consideration and reflected by the price paid by the Corps to Stearns. To now give the Commonwealth the claimed offset, would be to doubly penalize Stearns. Cf. *Commonwealth* v. *Kelley,* 314 Ky. 581, 236 S. W. 2d 695, 697 (1951) where it was held that a subsequent purchaser may not recover damages for reverse condemnation "because it is presumed that the damages were deducted from the purchase price."

Even assuming, arguendo, that Stearns received a windfall from the sale, there is no rule of law or in equity which would allow the Commonwealth a portion of those proceeds. Surely, in America, a landowner, whose property has been subjected to damage, retains the right to subsequently sell that property at any price to any purchaser, without having to account to the person who caused the damage.

Judgment will enter on this date in conformity with the jury verdict and this opinion. This the 19th day of January, 1982.

(s) J. B. Johnson, Jr., Judge
McCreary Circuit Court

Copies To:

Hon. Winfrey P. Blackburn, Jr.
Hon. Ronald D. Ray
Hon. Mark E. Gormley
Hon. Alan L. Harrington
Hon. Arthur Williams

RLH	1-19-82
Clerk's initials By, DW	Date

APPENDIX 2E

McCREARY CIRCUIT COURT

Civil Action No. 2994

STEARNS COAL & LUMBER COMPANY, INC., - *Plaintiff,*

v.

COMMONWEALTH OF KENTUCKY,
DEPARTMENT FOR NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION, - - *Defendant.*

AMENDMENT TO JUDGMENT OF JANUARY 19, 1982

Paragraph "4" of the Judgment dated January 19, 1982 shall be deleted and in its place is substituted the following:

4. That the Plaintiff is awarded and shall recover from the defendant the sum of $9,878,554.02, said amount representing the sum of the jury award of $6,700,000.00 and the aggregate amount of pre-judgment interest assessed at the rate of six (6%) percent simple interest per annum from June 25, 1975 until June 19, 1978, and thereafter at the rate of eight (8%) percent simple interest per annum until February 25, 1982, the date of the entry of this Judgment.

IT IS FURTHER ORDERED that the $9,878,554.02 judgment shall bear eight (8%) percent per annum simple interest pursuant to KRS 360.040 until and including July 14, 1982 (the effective date of the amendment of KRS 360.040) and thereafter the judgment plus accrued post judgment interest shall bear 12% interest compounded annually.

This the 25th day of February, 1982.

(s) J. B. Johnson, Jr., Judge
McCreary Circuit Court

Distribution:

Hon. Winfrey P. Blackburn, Jr.
Hon. Ronald D. Ray
Hon. Mark E. Gormley
Hon. Alan L. Harrington
Hon. Arthur Williams

RLH, DW	2-25-82
Clerk's initials	Date

APPENDIX 2F

McCREARY CIRCUIT COURT

Civil Action No. 2994

STEARNS COAL & LUMBER COMPANY, INC., - *Plaintiff,*

v.

COMMONWEALTH OF KENTUCKY,
DEPARTMENT FOR NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION, - - *Defendant.*

SUPPLEMENTAL OPINION AND ORDER

This matter is pending before the Court upon various post-judgment motions. The motions were presented by counsel at a hearing on January 29, 1982. The Court having considered the entire record and the argument of counsel is of the opinion that all pending motions should be overruled other than the plaintiff's motion to amend the Judgment entered on January 19, 1982.

The Court, having personally presided over the trial in question, finds that the verdict of the jury was within the range of the appraisal testimony and that same is supported by competent and substantial evidence. The Court has previously set out the reasons behind his rulings during the trial and entered an opinion on January 19, 1982, which is fully incorporated herein by reference.

The plaintiff has asked the Court to amend the Judgment of January 19, 1982, so as to provide for compounding of pre-judgment interest. Although there is considerable logic to the plaintiff's request, the Court is of the opinion that to grant this relief would be to judicially legislate, which it is prohibited from doing. The Court notes, however, that KRS 360.040 has been amended effective July 14, 1982, to provide that judgments shall bear interest at the rate of 12% per annum, compounded annually. The Court

is of the opinion that paragraph four of the Judgment therefore should be amended to fully take into consideration the amendments to the statute in question. Likewise the Judgment should be amended to fully reflect both the amount of the jury verdict ($6,700,000.00) and the total award of pre-judgment interest ($3,178,554.02), which has been calculated as simple interest at the rate of 6% from the date of the taking (June 25, 1975) until June 19, 1978, and thereafter at the rate of 8% simple interest until this 25th day of February, 1982. After entry of the Amended Judgment of this date, the Judgment shall continue to draw 8% simple interest until the effective date of the amendment of KRS 360.040, and thereafter interest shall accrue at the new legal rate (12% compounded annually).

The defendant argues that paragraph five of the Judgment should be deleted, contending that under KRS 453.010 "the Commonwealth is given the discretion to pay court costs in a civil action and the Defendant states it will not pay the costs of this action." The Court does not agree with this contention. The statute gives the discretion to "the judge of the court in which the case was filed", not to the Commonwealth. The Court has determined that the Commonwealth should pay the costs in this case. However, so that there will be no misunderstanding, the Court does not consider attorneys fees to be court costs.

IT IS THEREFORE ORDERED that the defendant's motion for judgment notwithstanding the verdict, motion for new trial, and motion to alter, amend or vacate be, and the same hereby are, OVERRULED. It is further ORDERED that the plaintiff's motion to amend or alter the judgment is sustained to the limited extent noted in the opinion above.

This the 25th day of February, 1982.

(s) J. B. Johnson, Jr., Judge
McCreary Circuit Court

Distribution:

Hon. Winfrey P. Blackburn, Jr.
Hon. Ronald D. Ray
Hon. Mark E. Gormley
Hon. Alan L. Harrington
Hon. Arthur Williams

RLH, DW	2-25-82
Clerk's initials	Date

APPENDIX 3

SUPREME COURT OF KENTUCKY

82-SC-279-TG and 83-SC-183-TG
Consolidated with 83-SC-78-TG

COMMONWEALTH OF KENTUCKY,
NATURAL RESOURCES AND ENVIRONMENTAL
PRETECTION CABINET - - - - - *Appellant/ Cross-Appellee*

v.

STEARNS COAL AND LUMBER
COMPANY, INC. - - - - - - *Appellee/ Cross-Appellant*

Appeal from McCreary Circuit Court
No. 2994
Honorable J. B. Johnson, Jr., Judge

ORDER DENYING PETITION FOR REHEARING

The petition for rehearing is denied.

Stephens, C.J., not sitting.

ENTERED November 15, 1984.

(s) J. Calvin Aker
Deputy Chief Justice

APPENDIX 4

SUPREME COURT OF KENTUCKY

82-SC-279-TG and 83-SC-183-TG
Consolidated with 83-SC-78-TG

COMMONWEALTH OF KENTUCKY,
NATURAL RESOURCES AND ENVIRONMENTAL
PROTECTION CABINET - - - - - *Appellant/ Cross-Appellee*

v.

STEARNS COAL AND LUMBER
COMPANY, INC. - - - - - - *Appellee/ Cross-Appellant*

Appeal from McCreary Circuit Court
Civil Action No. 2994
Hon. J. B. Johnson, Jr., Judge

NOTICE OF APPEAL OF STEARNS COAL AND LUMBER COMPANY, INC. TO SUPREME COURT OF THE UNITED STATES

Stearns Coal and Lumber Company, Inc., Appellee/ Cross-Appellant herein, by counsel, hereby notifies the Court pursuant to Rule 10 of the Supreme Court of the United States that it appeals to the Supreme Court of the United States from the judgment of this Court in the above-styled case entered January 19, 1984, on which rehearing was denied November 15, 1984, and which is officially re-

ported at 678 S. W. 2d 378. Appeal is taken under 28 U.S.C. § 1257(2).

(s) Winfrey P. Blackburn, Jr.
Winfrey P. Blackburn, Jr.
Lively M. Wilson
STITES & HARBISON
600 West Main Street
Louisville, Kentucky 40202
Telephone: (502) 587-3400

Filed: January 31, 1985

APPENDIX 5

TEXT OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, Constitution of the United States (excerpt):

> . . . [N]or shall private property be taken for public use without just compensation.

Fourteenth Amendment, Constitution of the United States (excerpt):

> . . . [N]or shall any State deprive any person of property, without due process of law.

Section 13, Kentucky Constitution (excerpt):

> . . . [N]or shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.

Section 242, Kentucky Constitution:

> Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction. The general assembly shall not deprive any person of an appeal from any preliminary assessment of damages against any such corporation or individual, made by commissioners or otherwise; and upon appeal from such preliminary assessment, the amount of such damages shall, in all cases, be determined by a jury, according to the course of the common law.

1972 KY. ACTS, CH. 117 (EXCERPTS)

CHAPTER 117

(S. B. 138)

AN ACT relating to the establishment of a Wild Rivers System.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. This Act may be cited as the Kentucky Wild Rivers Act.

Section 2. A new section of Chapter 146 of the Kentucky Revised Statutes is created to read as follows:

As used in this Act, the words listed herein shall have the following respective meanings, unless another or different meaning or intent shall be clearly indicated by the context:

(1) "Stream or watercourse" shall mean a flowing body of water or a section or portion, thereof, including rivers, streams, and creeks.

(2) "Free flowing" shall mean existing or flowing in a natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway. The existence, however, of low dams, diversion works, and other minor structures at the time any stream is proposed for inclusion in the Wild Rivers System shall not automatically bar its consideration for such inclusion; Provided, that this shall not be construed to authorize, intend to encourage future construction of such structures within components of the Wild Rivers System.

(3) "Road" shall mean a highway, a hard-surfaced road, or an improved or unimproved dirt road. The existence,

however, of unimproved roads at the time any stream is proposed for inclusion in the Wild Rivers System shall not automatically bar its consideration for such inclusion; Provided, that this shall not be construed to authorize, intend to encourage future construction of such roads where this would be contrary to the provisions of this Act.

(4) "Scenic easement" shall mean a perpetual easement in land which (i) is held for the benefit of the people of Kentucky, (ii) is specifically enforceable by its holder or beneficiary, (iii) limits or obligates the holder of the servient estate, his heirs, and assigns, with respect to their use and management of the land and activities conducted thereon, the object of such limitations and obligations being the maintenance or enhancement of the natural beauty of the land in question or of areas affected by it.

(5) "Wilderness type recreation" shall mean activities such as fishing, hunting, canoeing, camping, hiking, horseback riding, exploring, archaeological and scientific investigation, and scenic and aesthetic enjoyment, which utilizes and protects to the highest degree the primitive and natural values of the area.

(6) "Visual horizon" shall mean the normal distance to which land and vegetative features can be unobstructedly viewed from the center of the stream.

(7) "Access point" shall mean an area along the stream under public ownership, or under easement acquired by agreement with a private landowner. This area would be available for public recreational use including, but not limited to, the launching of boats, picnicking and camping.

(8) "Commissioner" shall mean the Commissioner of Natural Resources or the successor to that office.

Section 3. A new section of Chapter 146 of the Kentucky Revised Statutes is created to read as follows:

The General Assembly hereby recognizes that certain streams of Kentucky possess outstanding and unique scenic, recreational, geological, fish and wildlife, botanical, historical, archaeological and other scientific, aesthetic, and cultural values. It is the policy of the General Assembly to complement dam construction and development projects on Kentucky watercourses with other equally important and beneficial uses of our water resources. Therefore, it is hereby declared that in order to afford the citizens of the Commonwealth an opportunity to enjoy natural streams, to attract out-of-state visitors, to assure the well-being of our tourist industry, to preserve for future generations the beauty of certain areas untrammeled by man, it is in the interest of the Commonwealth to preserve some streams or portions thereof in their free-flowing condition because their natural, scenic, scientific, and aesthetic values out-weigh their value for water development and control purposes now and in the future. For aesthetic, as well as ecological reasons, the foremost priority shall be to preserve the unique primitive character of those streams in Kentucky which still retain a large portion of their natural and scenic beauty, and to prevent future infringement on that beauty by impoundments or other manmade works. Since the stream areas are to be maintained in a natural state, they will also serve as areas for the perpetuation of Kentucky's wild fauna and flora. Few such streams remain in the Eastern portion of the United States, and the General Assembly feels a strong obligation to the people of Kentucky to preserve these remnants of their proud heritage. It is the purpose of this Act to establish a Wild Rivers System by designating certain streams for immediate inclusion in the System and by prescribing the procedures and criteria for protecting and administering the System. It is not the intent of this Act to require or to authorize acquisition of all lands or interests in lands

within the exterior boundaries of the stream areas but to assure preservation of the scenic, ecological and other values and to provide proper management of the recreational, wildlife, water and other resources.

Section 4. A new section of Chapter 146 of the Kentucky Revised Statutes is created to read as follows:

Streams which substantially meet the following criteria are elegible for inclusion in the Wild Rivers System:

Streams or sections of streams that are essentially free-flowing, with shorelines and scenic vistas essentially primitive and unchanged, free from evidence of the works of man, and pleasing to the eye. The waters shall not be polluted beyond feasible correction and shall be kept unpolluted once corrected according to standards established by the Kentucky Water Pollution Control Commission. The Area may provide a high quality fish and wildlife habitat, containing one or more unique or rare species for sport or observation. It may provide opportunities for scientific study or appreciation of essentially undisturbed ecological, geologic, or archaeologic conditions. It shall provide wilderness type recreation such as canoeing and hiking, or specialized uses without disturbing the primitive character of the area. Within the boundary areas set forth in Section 6 of this Act, lands adjacent to these streams that are not already in state or other public ownership shall be protected by acquisition of fee title or by scenic easements to the full extent necessary to preserve a true primitive environment in its pristine state.

Section 5. A new section of Chapter 146 of the Kentucky Revised Statutes is created to read as follows:

The streams or segments of streams to be initially included in this system, being classified by the above stated criteria, are as follows:

The Cumberland River from Summer Shoals to the backwater of Lake Cumberland.

The Red River from the Ky. 746 bridge to the mouth of Swift Camp Creek, Nothing in this bill shall be construed to prohibit that portion of the Red River between Peck's Branch and Swift Camp Creek from being used to temporarily contain flood waters that may be impounded above the normal sustained pool level of any lake which may be created in the event a dam is constructed on the Red River near Bowen, Kentucky.

The Rockcastle River from the Ky. 80 bridge to the backwater of Lake Cumberland. Nothing in this Act shall be construed to prohibit or interfere with the relocating of Ky. 80, including the construction of a bridge at a point approximately 2.35 miles downstream from the existing Ky. 80 bridge.

The Green River from the eastern boundary of Mammoth Cave National Park extending downstream and including that portion of the river within the Park.

The Big South Fork of the Cumberland River from the Tennessee border to Blue Herron.

Section 6. A new section of Chapter 146 of the Kentucky Revised Statutes is created to read as follows:

The Commissioner of Natural Resources shall, within two (2) years after the enactment of this legislation determine generally the boundaries of the stream area associated with the stream or stream segment initially included in the Wild Rivers System by this Act. Establishment of these boundaries shall be accomplished in such a way that it includes at least the visual horizon from the stream, but not more than two thousand five hundred (2,500) feet from the center of the stream. The boundary shall further include access points, at the upstream and downstream boundary of the area.

Section 7. A new section of Chapter 146 of the Kentucky Revised Statutes is created to read as follows:

The Commissioner of Natural Resources shall study and from time to time submit to the Governor and to the General Assembly proposals for additions to the Wild Rivers System of Streams and sections of streams which, in his judgment, would qualify for inclusion therein. Each proposal shall be accompanied by:

(1) A detailed map showing the boundaries of the stream or sections of streams and those adjacent lands needed to protect and administer the needed controls.

(2) The category of the proposed additions in accordance with Section 4 of this Act.

(3) A detailed report on the factors which make the area a worthy addition to the system.

The intention of this requirement is to insure that such studies will be made; it is not intended to preclude or discourage, but rather encourage similar studies and proposals by other agencies or by citizen groups working independently. Authority for additions to the Wild Rivers System shall remain exclusively with the Kentucky General Assembly.

Section 8. A new section of Chapter 146 of the Kentucky Revised Statutes is created to read as follows:

The Wild Rivers System shall be administered by the Department of Natural Resources according to the policies and criteria set forth in this Act. The Commissioner of Natural Resources is authorized to adopt any rules or regulations necessary for the preservation and enhancement of the stream areas as set forth in Section 6 of this Act, and for control of recreational, educational, scientific and other uses of these areas in a manner that shall not impair them. In such administration primary emphasis

shall be given to protecting aesthetic, scenic, historic, archaeologic, and scientific features of the area. The Commissioner shall develop a management plan for a designated stream area and shall publicize and hold public hearings and record the views expressed on each plan developed. Management plans for a given stream area may establish varying degrees of intensity for its protection, based on special attributes of each area, but shall follow the concepts embodied in Section 4 of this Act.

Section 9. A new section of Chapter 146 of the Kentucky Revised Statutes is created to read as follows:

Within the exterior boundaries of a designated stream area, as established and authorized by the Kentucky General Assembly, the Commissioner of Natural Resources is authorized and empowered to acquire by purchase, exercise of the rights of eminent domain, grant, gift, devise or otherwise, the fee simple title to, a scenic easement on, or any acceptable lesser interest in any lands, and by lease or conveyance, contract for the right to use and occupy any lands. Where property within such boundaries is owned by the federal government, the Commissioner can enter into agreements with the landowning agency concerning use of the property consistent with the objectives of this Act. Nothing in this Act shall be construed to deprive a landowner of his property or any interest or right therein without just compensation.

The Commissioner is authorized to exercise the right of eminent domain only where it is absolutely necessary in order to acquire access points or to maintain the character of the area within the meaning of this Act. The Commissioner shall not obtain an easement if the landowner objects thereto, but in such case must obtain fee title, with full compensation to the landowner.

The Commissioner of Natural Resources may not exercise authority to acquire lands or interests in lands located within any incorporated city, village, or county when such entities have in force a duly adopted, valid ordinance or plan for the management, zoning and protection of such lands in accordance with the provisions of this Act.

Section 10. A new section of Chapter 146 of the Kentucky Revised Statutes is created to read as follows:

Lands uses to be allowed within the exterior boundaries of a designated stream area shall be as follows:

No new roads or buildings shall be constructed. Utility lines or pipelines shall not be constructed unless approved by the Commissioner in writing and under provision that the affected land be restored as nearly as possible to its former state. This provision, however, shall in no way affect the rights between a landowner and a utility company or pipeline company. There shall be no mining, and select cutting of timber shall be allowed only pursuant to regulations issued by the Commissioner. All land disturbances, including instream disturbances such as dredging, shall be prohibited. Except for the management agency, access shall be by foot, horseback, canoe, boat or other nonmechanical modes of transportation. If there are existing agricultural areas within the boundaries of the area, such areas may continue to be used for agricultural purposes.

Section 11. A new section of Chapter 146 of the Kentucky Revised Statutes is created to read as follows:

Any component of the Wild Rivers System that is or shall become a part of any state park, wildlife refuge, or similar state administered area shall be subject to the provisions of this Act and the laws under which the other areas may be administered, and in the case of conflict between

the provisions of these laws the more restrictive provisions shall apply.

Section 12. A new section of Chapter 146 of the Kentucky Revised Statutes is created to read as follows:

All state agencies shall, promptly upon enactment of this Act, inform the Commissioner of Natural Resources of any proceedings, studies, or other activities within their jurisdictions, and regardless of by whom requested, which are now in progress and which affect or may affect any of the streams specified in Section 5. They shall likewise inform him of any such proceedings, studies or other activities which are hereafter commenced or resumed before they are commenced or resumed.

. . . .

Section 14. A new section of Chapter 146 of the Kentucky Revised Statutes is created to read as follows:

The Commissioner of Natural Resources may employ such technical, clerical, stenographic and other employees and assistants as are required to effectively carry out his duties and responsibilities as provided in this Act.

. . . .

Section 16. A new section of Chapter 146 of the Kentucky Revised Statutes is created to read as follows:

It shall be the duty of the Attorney General, upon the request of the Commissioner of Natural Resources, to bring an action for the recovery of the penalties herein provided for and to bring an action for a restraining order, temporary or permanent injunction, for the prevention or correction of a condition constituting or threatening to constitute a violation of this Act. All actions for injunctive relief for violation of this Act shall be brought in the name of the Commonwealth of Kentucky by the Attorney General

in the Franklin Circuit Court. If such action seeks recovery of penalties in addition to injunctive relief, it shall be brought to one of the counties through which the designated portion of the river runs.

Section 17. A new section of Chapter 146 of the Kentucky Revised Statutes is created to read as follows:

Any person, corporation, city, county or other governmental subdivision who violates any of the provisions of this Act shall be liable to a civil penalty of not more than $1,000.00 for said violation and in addition may be enjoined from continuing said violation. Each day upon which such violation occurs or continues shall constitute a separate offense.

Approved March 23, 1972

1974 KY. ACTS, CH. 206

Note: Text in brackets [ ] is deleted from prior law; text in italics is added to prior law.

CHAPTER 206
(S.B. 99)

AN ACT relating to the Wild Rivers System.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. KRS 146.240 is amended to read as follows:

The streams or segments of streams to be [initially] included in this system, being classified by the above stated criteria, are as follows:

(1) The Cumberland River from Summer Shoals to the backwater of Lake Cumberland.

(2) The Red River from the Ky. 746 bridge to the mouth of Swift Camp Creek. Nothing in KRS 146.200 to 146.350 shall be construed to prohibit that portion of the Red River between Peck's Branch and Swift Camp Creek from being used to temporarily contain flood waters that may be impounded above the normal sustained pool level of any lake which may be created in the event a dam is constructed on the Red River near Bowen, Kentucky.

(3) The Rockcastle River from the Ky. 80 bridge to the backwater of Lake Cumberland. Nothing in KRS 146.200 to 146.350 shall be construed to prohibit or interfere with the relocating of Ky. 80, including the construction of a bridge at a point approximately 2.35 miles downstream from the existing Ky. 80 bridge.

(4) The Green River from the eastern boundary of Mammoth Cave National Park extending downstream and including that portion of the river within the *Mammoth Cave National* Park.

(5) The Big South Fork of the Cumberland River from the Tennessee border to Blue Herron.

(6) Martins Fork, Cumberland River from Ky. Highway 987 bridge to the eastern boundary of Cumberland Gap National Park.

(7) Rock Creek from the White Oak Junction Bridge to the Kentucky-Tennessee border.

(8) Little South Fork, Cumberland River from the backwater of Lake Cumberland (mile 4.1) to the Kentucky Highway 92 bridge (mile 14.5) in Wayne and McCreary Counties.

Approved March 29, 1974

1976 KY. ACTS, CH. 197, §8

Note: Text in brackets [ ] is deleted from prior law; text in italics is added to prior law.

Section 8. KRS 146.280 is amended to read as follows:

(1) Within the [exterior] boundaries of a designated stream area, as established and authorized by the Kentucky General Assembly, the secretary for natural resources and environmental protection is authorized and empowered to acquire by purchase, exercise of the rights of eminent domain, grant, gift, devise or otherwise, the fee simple title, *an* [to, a scenic] easement [on,] or any acceptable lesser interest in any lands, and by lease or conveyance, contract for the right to use and occupy any lands. Where property within such boundaries is owned by the federal government, the secretary can enter into agreements with the landowning agency concerning use of the property consistent with the objectives of KRS 146.200 to 146.350. Nothing in *this Act* [KRS 146.200 to 146.350] shall be construed to deprive a landowner of *the fee simple title to or lesser interest in* his property [or any interest or right therein] without just compensation.

[(2) The secretary is authorized to exercise the right of eminent domain only where it is absolutely necessary in order to acquire access points or to maintain the character of the area within the meaning of KRS 146.200 to 146.350. The secretary shall not obtain an easement if the landowner objects thereto, but in such case must obtain fee title, with full compensation to the landowner.]

(2)[(3)] The secretary for natural resources and environmental protection may not exercise authority to acquire lands or interests in lands located within any incorporated city, village, or county when such entities have in force a duly adopted, valid ordinance or plan for the management, zoning and protection of such lands in accordance with the provisions of KRS 146.200 to 146.350.

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APPENDIX 6

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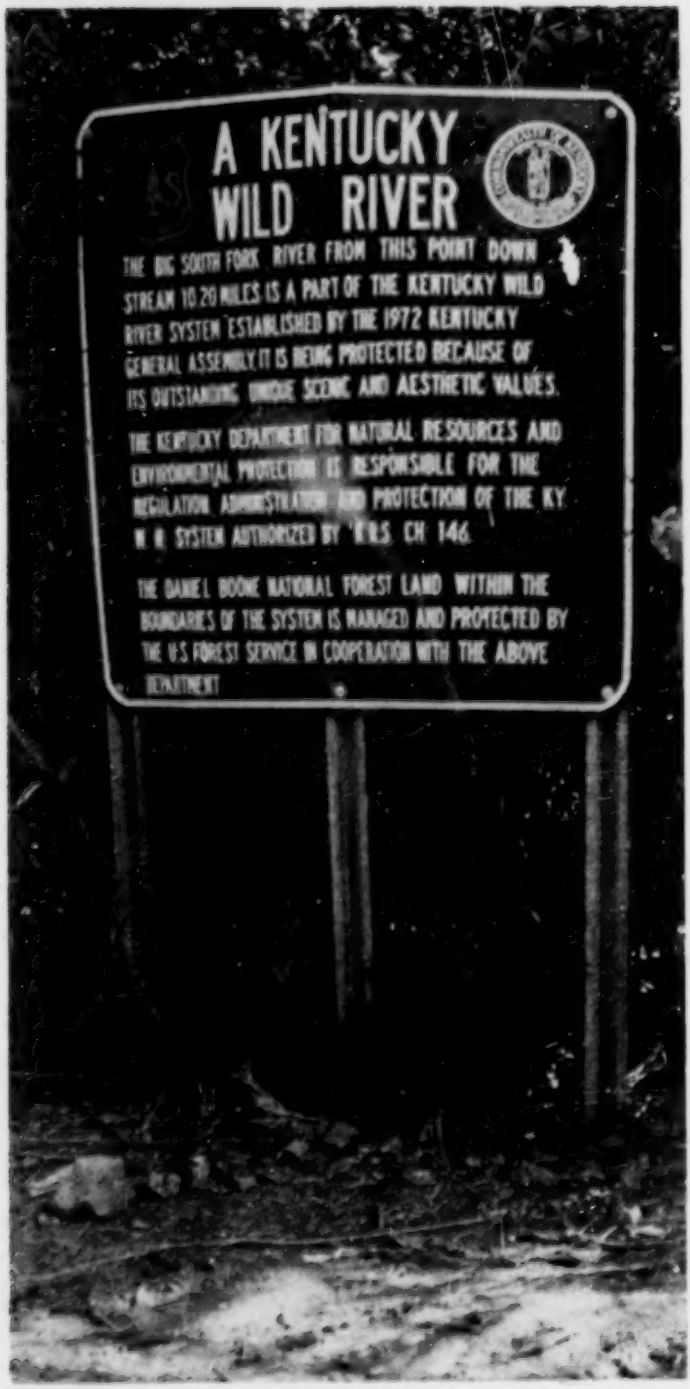
APPENDIX 7



No. 84-1292

Office-Supreme Court, U.S.
FILED
MAR 19 1985
ALEXANDER L. STEVAS,
CLERK

SUPREME COURT OF THE UNITED STATES

October Term 1984

STEARNS COAL AND LUMBER COMPANY, INC. - - - - - - - - - - Appellant

versus

COMMONWEALTH OF KENTUCKY, NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET - - Appellee

---

On Appeal From the Supreme Court of Kentucky

MOTION TO DISMISS

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36 pp

QUESTIONS PRESENTED

1. **Will this Court dismiss an appeal of a decision which rests on an independent and adequate non-federal ground?**
2. **Will this Court dismiss an appeal of a decision which does not draw into question and does not expressly pass upon a federal question?**
3. **Will this Court dismiss an appeal of a decision which presents no substantial federal question?**
4. **Will this Court dismiss an appeal of a decision where legislation enacted prior to the filing of the original complaint obviates the matters in dispute?**

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SUPREME COURT OF THE UNITED STATES

October Term 1984

No. 84-1292

STEARNS COAL AND LUMBER COMPANY, INC. - *Appellant*

COMMONWEALTH OF KENTUCKY,
NATURAL RESOURCES AND ENVIRONMENTAL
PROTECTION CABINET - - - - - *Appellee*

On Appeal From the Supreme Court of Kentucky

MOTION TO DISMISS

Appellee in the above entitled case moves to dismiss the appeal on the grounds that the decision below rests on an adequate and independent nonfederal ground; the decision below presents no substantial federal question; no federal question was expressly passed on by the decision below and legislation enacted by the state prior to the filing of the original complaint has obviated the matters in dispute.

OPINIONS BELOW

The Appellee takes strong issue with the Appellant's statement that the Supreme Court of Kentucky held below that the state could constitutionally appropriate the Appellant's property without payment of compensation.

The Supreme Court of Kentucky held that the land use restrictions of the Wild Rivers Act, 1972 Ky. Acts, Ch. 117 (Appellant's Appendix, pp. 53a-62a) were not self-executing but were conditioned and contingent upon the state determining the boundaries of the wild rivers areas by promulgated regulation. Therefore, consistent with its prior decision in *Commonwealth ex rel. D. N. R. & E. P.* v. *Stephens,* 539 S. W. 2d 303 (Ky., 1966) the court could not and would not enforce the prohibitions of the Wild Rivers Act against any property owner and therefore there was no taking of the Appellant's property as a matter of law. The court did indicate that the Appellant might have a valid trespass action against the Appellee.

STATUTES INVOLVED

In addition to the constitutional and statutory provisions cited by the Appellant, this appeal also involves the 1976 liberalizing amendments to the Wild Rivers Act 1976 Ky. Acts, Ch. 197, Sections 2 and 9 (Appendix 1).

The Appellant omitted from its Appendix the approved date of 1976 Ky. Acts, Ch. 197, March 29, 1976, which date is of critical and important significance in the history of this litigation.

STATEMENT OF THE CASE

The history of the Kentucky Wild Rivers Act and of this litigation are straightforward and closely linked.

Through both the codification within the Wild Rivers Act and twice as set forth by the Supreme Court of Kentucky (*Stephens, supra* and the case herein below) in decisions under the Wild Rivers Act, private property interests potentially affected by the provisions of the Wild Rivers Act have been given full constitutional protection against being taken without just compensation in a manner fully consistent with the decisions of this Court. 1972 Ky. Acts, Ch. 117, §9; 1976 Ky. Acts, Ch. 197, §2.

This protection for private property is and has been recognized by the Wild Rivers Act, the courts of Kentucky and this Appellee as fundamental and not subject to being abridged.

On March 23, 1972 the Governor of Kentucky approved 1972 Ky. Acts, Ch. 117 to become effective June 16, 1972.[1]

Section 3 (in pertinent part) of the 1972 Act sets forth the policy and purposes of the Wild Rivers Act:

> . . . certain streams of Kentucky possess outstanding and unique scenic, recreational, geological, fish and wildlife, botanical, historical, archeological and other scientific, aesthetic and cultural values.

---

[1]The Appellant has reproduced in its Appendix 5, pages 53a through 62a most sections of this Act. However, it has omitted Section 15 of the Act which the Appellee produces in Appendix 1. This is an important section of the Act and evinces and underscores the holding of the court below that the Act is enabling legislation and not self-executing.

> . . . it is hereby declared that in order to afford the citizens of the Commonwealth an opportunity to enjoy natural streams, to attract out of state visitors, to assure the well-being of our tourist industry, to preserve for future generations the beauty of certain areas untrammeld by man, it is in the interest of the Commonwealth to preserve some streams or portions thereof in their free-flowing condition because their natural, scenic, scientific and aesthetic values outweigh their value for water development and control purposes now and in the future.

Thus, Section 3 expressed the focus of the Act as preservation and protection of waters of the Commonwealth, owned by all and yet by none. Section 3 further provided that the Act did not require or authorize the acquisition of all lands or interests in lands to preserve and protect the streams and stream areas except where "necessary to preserve a true primitive environment in its pristine state." 1972 Ky. Acts, Ch. 117, Section 3.

Where it was necessary, however, the Act authorized the acquisition of fee title or scenic easement. 1972 Ky. Acts, Ch. 117, §4.

No landowner, except perhaps the Appellant, thought the Act required the state to condemn all areas within wild river boundaries.

By definition, the only stream segments and adjacent areas which could be included in the wild rivers system were those "with shore lines and scenic vistas essentially primitive and unchanged, free from the evi-

dence of the works of man and pleasing to the eye."[2] 1972 Ky. Acts, Ch. 117, §4.

The 1972 Act provided for the inclusion of segments of five streams or rivers including the Big South Fork of the Cumberland River from the Tennessee border to Blue Herron. This stream flowed through some of the Appellant's property.

To implement the Act, the Department for Natural Resources, an executive agency of the Commonwealth, was directed to ". . . determine generally the boundaries of the stream area," to include at least the visual horizon of the streams but not more than 2,500 feet from the center of the stream. 1972 Ky. Acts, Ch. 117, §6.[3]

Section 10 of the 1972 Act, which was never enabled as enacted, would have limited the land use activities allowed in wild river stream areas. Those activities the General Assembly determined to be most offensive to preserving the pristine and primitive nature of the streams would have been proscribed. For example,

---

[2]It was believed, rightfully so, that these primitive areas were unlikely candidates for any significant commercial use and that those areas not already within public ownership would continue to remain undeveloped and primitive and pristine as they had throughout history minimizing the necessity for any acquisition of lands.

[3]In practice, the Department had an employee-engineer place boundary lines on topographical maps from visual inspections of the streams and using standard survey and map-making techniques. Then, using these maps, the two inspectors of the Department for this program would make inspections of the streams and stream areas to determine the presence of land use activities regulated or restricted by the Act.

mining and land disturbances would have been prohibited. However, the Act would have allowed other economically beneficial uses within these small stream areas such as select-cutting of timber, agricultural uses and even the placement of utility lines or pipelines.

1974 Ky. Acts, Ch. 206, as approved March 29, 1974, added Rock Creek from the White Oak Junction Bridge to the Kentucky-Tennessee border to the wild rivers system. This stream also flowed through land in which the Appellant owned surface and/or mineral interests.

Two major themes run through Appellant's jurisdictional statement as grounds for its action against the Commonwealth. Each of these themes are without merit.

The first theme is that the Wild Rivers Act dedicates private property to public use. The second theme is that the Act "promised" or "guaranteed" land owners that the state would buy their property.

Throughout Stearns' jurisdictional statement, Stearns states that the Wild Rivers Act was just a device to expand the state park system and that stream areas are state park areas. (See, for example, jurisdictional statement, pages 2, 3, 14, 17, 26). This is, simply, not true.

Even a cursory review of the 1972 and 1976 Acts, evinces a scrupulous regard by the Kentucky General Assembly for the protection of private property rights and makes express distinctions between public and private lands within stream areas. If anything, the Acts are read to minimize even the public access to

public lands. The Acts delineate clearly and precisely the express affirmative grounds and methods for and by which the state might acquire private lands or provide for public use of private lands. 1972 Ky. Acts, Ch. 117, §§4, 9; 1972 Ky. Acts, Ch. 199, §§2, 9.

A second major theme in the jurisdictional statement is that the Wild Rivers Act "promised" and "guaranteed" that the state would buy all private property within stream areas.

This is a totally frivolous argument.

The irony of the Appellant's argument has been that the very language that the legislature utilized to codify the constitutional shield of protection for private property is the same language appellant uses as a sword against the throat of the state, like a thief in the night, insisting that the state "buy" their property. The Appellee conceives the codification of the constitutional protections as alchemy automatically converting their private property into gold.[4]

At this point in the chronology, it is helpful to examine the state's implementation of the Act.

Utilizing no more than about two inspectors for 109.6 miles of streams and 25,952 stream area acres for all the state's wild rivers, the state's implementation

[4]Although the state, in planning for the implementation of the Wild Rivers Act, may have determined, generally, the amount and value of private property in stream areas and may even have hoped that the legislature would provide funds for limited acquisition of necessary properties, the Appellant has produced no evidence, because there is none, where any government official "promised" or "guaranteed" any person, not even the Appellant, specific payment for their property.

of the Act was uncomplicated. The state printed and distributed brochures describing the wild river areas, it placed signs at the beginning and ends of wild river segments, the inspectors went up and down the streams and perhaps at times onto stream areas to determine the visual horizon and thereafter prepared topographic maps of boundary lines for in house reference and monitored stream areas to determine land uses not in conformance with the Wild Rivers Act.

In November 1974, the state took its first legal action on a land use in apparent conflict with the Act. The State found a timber clear-cutting operation within a supposed wild river stream area of the Cumberland River. The state sought and obtained a temporary restraining order against the clear-cutting in Franklin Circuit Court on November 1, 1974.

After the restraining order was obtained, the property owner moved to dissolve and the state moved for a temporary injunction. The Circuit Court granted the temporary injunction but ordered the State to institute proceedings to compensate the landowner for any rights taken.

The landowner and the state appealed to the Kentucky Supreme Court.[5]

---

[5]During the pendency of this appeal, on June 6, 1975 the state obtained two additional temporary restraining orders; one for an oil and gas drilling operation within what was believed to be the Rock Creek stream area and the second for two sawmilling operations along Rock Creek and also believed to be within the stream area. The oil and gas operations were being conducted by Western Reserves Oil Corporation, a lessee of the Appellant. Western Reserves remained restrained until October

(Footnote continued on following page)

Importantly, the restraining order against Western Reserves was the only formal legal action taken by the state with respect to the Appellant.

Also, the above-described legal actions constitute all legal actions taken by the state under the 1972 Act.

Against this backdrop, the Kentucky Supreme Court decided *Stephens, supra,* on July 2, 1976.

The court held that as the state, when seeking the restraining order against Stephens, had not "determined" the boundaries of the wild river areas as required by law (1972 Ky. Acts, Ch. 117, §6) that no court could determine whether any proscribed activity was within or without a wild river area and the state was without authority to restrain any land use that might be violative of the Act.

More fundamentally, the Kentucky Supreme Court held and construed that the Wild Rivers Act was enabling legislation and not self-executing. Otherwise, the prohibitions would have been in place automatically upon the effective date of the Act.

The *Stephens* opinion, as is the decision below, is a well reasoned defense supporting the constitutional protections of private property as enunciated by this Court.

There is also an interesting twist to the Stephens litigation. The landowners and amicus curiae in *Stephens* argued the state could not enforce the Act,

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28, 1977 and at one point was a plaintiff to this litigation. However, in 1981 the state and Western Reserves resolved their dispute and the state agreed to allow Western Reserves to apply to continue its oil and gas drilling operations.

could not impose the restrictions found in the Act, because the state had not determined the boundaries. The Appellant herein was that amicus curiae and represented by the counsel of record herein.

In this litigation, however, the Appellant, because it wants so badly for the state to buy its property, has argued the opposite position. That is, that the restrictions are in place and imposed upon their property from the enactment of the 1972 Act. This, of course, is what the Kentucky Supreme Court expressly rejected in *Stephens, supra.*

As a result of the Stephens litigation, legislation was introduced in the 1976 session of the Kentucky General Assembly to dramatically liberalize the Wild Rivers Act. The legislation changed the Wild Rivers Act from restricting uses to allowing essentially any use through a permitting process.

Importantly, the 1976 Act grandfathered in existing uses of land and allowed new roads, structures or buildings to be constructed to effect any use permitted under the Act. Further, any landowner could apply for a "change of use" to conduct timber removal, resource removal or other uses if it was not an existing use.[6]

On March 29, 1976 the Governor of Kentucky approved the liberalizing amendments which became effective June 19, 1976.

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[6]It has never been seriously asserted, even by the Appellant, that the greatly liberalized Act, effective June 19, 1976 constitutes a taking of property.

On March 29, 1976 it was therefore known that restrictions on land use under the 1972 Act, come June 19, 1976, would be significantly altered.

But, on April 7, 1976 eight days *after* the highly publicized approval of the 1976 amendments, the Appellant notified the state that on April 16, 1976 it would commence, within the boundaries of the Big South Fork wild river area, *every single activity* which would have been restricted or prohibited under the 1972 Act, if enabled.

Being mindful of the pending Stephens litigation, the state did not seek a judicial restraining order but did issue an administrative order seeking to preserve the status quo until an administrative hearing could be held. However, immediately upon the issuance of this administrative order the Appellant, on April 19, 1976 enjoined the state from interfering with the Appellant's activities. That restraining order continues in effect until this date.

Then, on May 25, 1976 the Appellant filed this inverse condemnation action for damages for restrictions allegedly imposed by the Wild Rivers Act.

One odd aspect to this litigation must be briefly highlighted. It is relevant.

Stearns had been, since about 1902, a large coal mining company and the major employer in McCreary County, Kentucky. For decades, it deep mined much coal through vast areas of McCreary County. In the course of this activity, Stearns laid down miles of railroad tracks, built tipples and coal washing machines and developed entire communities with company

owned stores, schools, churches and houses. Then, after several decades, the Appellant began to wind down its mining activities. By the 1950's it had pulled up its rails, closed the schools, razed the stores and moved the people from their homes. Communities that had once bustled with activity faded into memory.

By the mid-1960's the Appellant had essentially terminated its mining as its mineral reserves had substantially played out.

Previously, in 1937, Stearns had conveyed almost 40,000 acres of surface rights to the United States Forest Service.

During the 1950's, counsel for the Appellant, unsuccessfully, sought to have the Forest Service acquire the severed minerals under the surface of the previously conveyed lands.

The role of counsel to the company was assumed by Howard Baker, Jr. in the late 1950's and the early 1960's. In 1966, after an unsuccessful effort in 1964, Howard Baker, Jr. was elected to the United States Senate.

A major piece of legislation enacted under Senator Baker's guidance was the Big South Fork National River and Recreation Act (Pub. L. 93-251, Title I, §108, Mar. 7, 1974, 16 U.S.C. §460ee) which later had appropriated 16.5 million dollars for land acquisition.

Then, without notice to the parties or the trial court, in August 1979 the United States acquired "under threat of condemnation" (as stated by Stearns) 16.5 million dollars worth of Stearns real property interest, including 12,227 acres of the 27,332 acres in dispute in

this litigation! For the property in dispute in this litigation Stearns received approximately 5.6 million dollars from the United States.

The legal relevancy of this transaction, as the state has contended this was a voluntary sale, is the underlying concept in damages of being made whole.

If, as Appellant contends, this sale was under threat of condemnation, it must be presumed that Appellant received fair market value. Therefore, this case presented the question of whether a person in the position of Appellant was entitled to receive the fair market value twice from two different governmental entities.[7]

The Appellant's Statement of the Case contains an unusual number of mischaracterization of the facts and record some of which have been addressed above. Appellee would be remiss if it did not attempt to briefly respond to the more egregious misstatements.[8]

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[7]The Kentucky Supreme Court properly found that this sale by Stearns to the United States was relevant and material to a possible set-off against the trial court's judgment.

[8](1) p. 5—the state never invited the public to enter on and use Stearns' property. (2) p. 8 (footnote 10)—the Appellee has permitted several resource removal actions in the past several years including oil and gas drilling. (3) p. 9 — at the time (April 6, 1976) Stearns says it was "now facing the prospect of a new set of prohibitions" the 1976 liberalizing amendments had already been approved by the Governor (March 29, 1976). (4) p. 10 — Stearns states that it was "notified that the United States wanted to purchase"—Stearns did not reveal to this Court that in 1975 Senator Baker met with the president of Stearns to discuss the amount of the purchase price for the United States buying Stearns' properties. (5) p. 11 — the Kentucky Supreme Court did not find that the Appellant suffered any deprivation of property (it did state that an action for trespass might have

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ARGUMENT

I. The Judgment Below of the Kentucky Supreme Court Rests on an Adequate Nonfederal Basis.

The Kentucky Supreme Court applied the law of the case of *Commonwealth, ex rel, D.N.R. & E.P.* v. *Stephens, supra,* to reach its decision in the case herein. The Kentucky Supreme Court stated that:

> In Stephens, *supra,* this Court held that until the stream areas were designated, the Commonwealth could not enforce the prohibitions of the act against any property owner. Consequently, there was no taking of the Stearns property as a matter of law.
>
> * * *
>
> The passage of the wild rivers act was not a taking of the property. The enforcement of the Act could not have occurred until at least July 22, 1976 when the boundaries were officially designated by proper regulation. (Appellant's Appendix, 4a).

In *Stephens, supra,* the Court construed and interpreted the Wild Rivers Act and held that it is enabling legislation, not self-executing. Its effectiveness was absolutely dependent on the state complying with all procedural prerequisites as a condition of any of the restrictions being effective or enforced.

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been brought). (6a) p. 11—the Kentucky Supreme Court did not say that even if some enforcement actions unconstitutionally infringed on property rights the remedy was injunction not a suit for damages. (7) p. 12 — in addition to the beneficial economic uses Stearns made of its property it at all times retained full possession and use of its property.

It is respectfully submitted that the Kentucky Supreme Court, being the highest state court in which a decision could be had in this case, based its opinion expressly upon a substantial and sufficient nonfederal ground and the Supreme Court of the United States should not take jurisdiction to review the opinion. *Black* v. *Cutter Laboratories,* 351 U. S. 292 (1956).

Twice, the Kentucky Supreme Court has been presented with the construction of the 1972 Wild Rivers Act and its holdings have been evenhanded, consistent and uniform in holding that the Act is enabling legislation and did not take property by its mere enactment.

In *Cuyahoga Power Company* v. *Northern Realty Company,* 244 U. S. 300 (1917) the appeal was dismissed where, as in this case, the controversy revolved around a matter of purely state law, that being the exercise of the power to condemn. This Court held this constituted an adequate nonfederal basis to dismiss the appeal.

Although the Kentucky Supreme Court discusses taking law under leading federal cases, it is clear that the Kentucky court did not rest its decision to any extent upon the application or interpretation of federal law. But, even if it had, the nonfederal ground is independent of the federal ground and adequate to support the judgment. *Jankovich* v. *Indiana Toll Road Commission,* 379 U. S. 487 (1965). See also *Utley* v. *St. Petersburg,* 292 U. S. 106 (1934); *Minneapolis and Co. Ry.* v. *Washburn Co.,* 254 U. S. 370 (1920).

It is fundamental that state courts have the supreme power to interpret the written laws of the state. As Justice Reed wrote in *Greenough* v. *Tax Assessors of Newport,* 331 U. S. 486 (1947):

> State courts construe their statutes according to their understanding of state policy and apply them to such situations as their interpretation of the statutory language requires. In so adjudging, they are the final judicial authority upon the meaning of their state law. It is only in circumstances where their judgments collide with rights secured by the federal constitution that we have power to protect or enforce the federal rights.

At page 497.

This Court is bound to accept the interpretation of state law in the decision of the Kentucky Supreme Court that as a matter of Kentucky law the statute is enabling legislation dependent for substantive force on the formal establishment of stream areas. *J. Bacon & Sons* v. *Martin,* 305 U. S. 380 (1939).

The Kentucky Supreme Court expressly held that its decision that there was no taking was a matter of state law. (Appellant's Appendix, 4a). This Court has consistently held that it will accept and does not review such questions of state law. *Johnson* v. *New Jersey,* 384 U. S. 719 (1966).

There can be no question as to the presence of fair and substantial evidentiary support in the facts for the state court ruling on the issue of whether the boundaries had been determined. Indeed, as emphasized in

the statement of the case herein, the legal necessity for formal boundary determination was espoused and advocated not just by Appellee *but also by counsel for Appellant* as amicus curiae in the earlier *Stephens* case!

The Kentucky Supreme Court's decision is so clearly rested on the construction of the state statute that there is no doubt that even if this Court modified the state court's views expressed on the federal laws the same judgment would still be rendered by the state court. Thus, this Court's review would amount to essentially an advisory opinion. *Herb* v. *Pitcarin,* 324 U. S. 117 (1945); *Murdock* v. *City of Memphis,* 20 Wall. 590 (1874).

Thus, the decision of the Kentucky Supreme Court satisfies both major elements necessary for this Argument: (1) the state court judgment is based on a nonfederal ground, and (2) the nonfederal ground is adequate to support the state court judgment. As well stated in Stern and Gresman, Supreme Court Practice, 5th Edition, 1978, p. 165:

> . . . in respect to construction of state statutes, the state court views are completely nonreviewable by the Supreme Court. If the sole basis of the decision is one of construction, the case cannot be the subject of either appeal or certiorari.

Therefore, based on the above Argument and authority this Court must dismiss the appeal.

II. The Judgment Below of the Kentucky Supreme Court Did Not Draw Into Question or Expressly Pass on the Federal Question Presented.

The decision of the Kentucky Supreme Court does not expressly adjudicate the federal claims which Appellant had asserted.

The appellate jurisdiction of this Court cannot be invoked under 28 U.S.C. §1257(2) where the court below does not draw into question and expressly pass upon a federal question.

Although the Kentucky Supreme Court discusses its understanding of the federal law of taking jurisprudence it cannot be asserted that there was any decision on a federal question that was necessary for the court to render its opinion. *Durley* v. *Mayo,* 351 U. S. 277 (1956). Nor can it be reasonably claimed that any federal right was adjudicated against the Appellant by the judgment of the state court. *Cleveland and Pittsburgh Railroad Company* v. *City of Cleveland, Ohio,* 235 U. S. 50 (1914).

It is apparent that the court did not treat the federal questions raised by Appellant as necessarily involved in its holding and it reached its result without deciding the federal constitutional questions.

While the Appellant may have "pressed" federal constitutional claims below, the Kentucky Supreme Court did not "pass upon" those claims. *Illinois* v. *Gates,* 103 S. Ct. 2317 (1983), *State Farm Mutual Automobile Insurance Co.* v. *Duel,* 324 U. S. 154 (1945).

To preserve the fundamental and historical balance between the federal and state court jurisdictional forums this Court must be "wary of assuming jurisdiction" in this action as the federal questions raised by the Appellant were not necessary to the decision. *Department of Mental Hygiene of California* v. *Kirchner,* 380 U. S. 194 (1965). Any doubts this Court might have concerning its jurisdiction must be resolved against jurisdiction. *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62 (1948).

Therefore, the appeal must be dismissed as no federal question has been expressly passed upon by the Kentucky Supreme Court below.

III. The Matters in Dispute Below Do Not Present Any Substantial Federal Question Nor Warrant Plenary Consideration.

The Kentucky Supreme Court rested its decision on the necessity of state procedure being followed to enable the state Wild Rivers Act as a matter of law. The decision of the court, therefore, does not present a substantial federal question. *Iowa Central Railway Co.* v. *Iowa,* 160 U. S. 389 (1896); *Londoner* v. *Denver,* 210 U. S. 373 (1908).

Further, the decision of the Kentucky Supreme Court revolves upon the *construction* of that portion of the Wild Rivers Act requiring the state to determine the boundaries of the stream areas and actually does not address the *validity* of the statute. Thus, no federal question is presented. *Grand Gulf Railroad and Banking Company* v. *Marshall,* 53 U. S. 83 (1851).

The Appellant focuses its discussion of why its questions presented are substantial on two major areas. First, it makes the argument that 1972 Ky. Acts, Ch. 117, by its own terms and application, "took" its property from the date of enactment.

The Appellant faces an immediate problem with that argument because at the trial court it argued and the court accepted as the date of taking not the date of enactment of the 1972 Act but a date over three years later, June 25, 1975. This was the date the state obtained a restraining order against Stearns lessee. Stearns' arguments are inexplicably inconsistent.

Thus, the Appellent's first major theme is that the express terms and effect of the 1972 Act constituted a taking of its property.

On this issue is presented the nexus of this case. For it focuses precisely on whether the Kentucky Supreme Court's decision that the 1972 Act is enabling legislation as a matter of state law is correct and proper.

If the Kentucky court is to be upheld in that determination then, as a matter of state law, the restrictions of the 1972 Act have no legal relevance under the taking analysis until the Act became enabled on July 22, 1976 when the state promulgated the boundaries of the stream areas. Again, the irony of this case is that is exactly what counsel for Appellant argued in *Stephens, supra,* where the court ruled in Appellant's favor.

Then, when the Act became enabled on July 22, 1976, the 1976 liberalizing amendments had gone into effect.

With its complete change of focus allowing all existing uses and establishing a change of use permitting scheme there is really no question that the 1976 amendments would pass constitutional muster.

This Court has held that it will not review a constitutional challenge to a state law where legislation subsequent to the Complaint has laid to rest the constitutional issues in dispute. This principle must be applied herein. *Stickney* v. *Kelsey,* 209 U. S. 419 (1908).

If this Court overrules the court below and holds that the Kentucky court's decision on the enabling issue is erroneous then a full constitutional defense of the 1972 Act by Appellee will be made in the brief on the merits.

However, as the Kentucky Supreme Court concluded, it is apparent that the 1972 Act had no legally significant consequence for the property of Appellant.

It is fundamental that a determination of a taking must address, on an ad hoc factual basis, each discrete parcel of real property alleged to have been taken.

This is where the Appellant makes its second major argument and where it encounters its second and most telling problem.

If this Court were to examine, as the Kentucky Supreme Court did, not what the state said but what the state did (as requested by the Appellant) the conclusion is inescapable that, as to Appellant and Appel-

lant's property, the state did no act significantly affecting the property of the appellant.

One or more inspectors may have walked upon Appellant's property somewhere within the 27,000 acre area. Signs were posted at the beginning and end of river segments. But the signs did not, as Appellant contends, invite the public to use Appellant's property. See Appellant's Appendix 7. The state restrained an oil and gas lessee from June 25, 1975 to October 28, 1977. Public information brochures were distributed in parts of the state generally informing the public of the wild rivers program.

That is what the state did.

Conversely, the Kentucky Supreme Court found that Stearns retained full possession and ownership of the lands, it cut timber for commercial sale, it received royalties from a five year oil lease on 9,930 acres, it had a 37,000 acre lease to Western Reserves Oil Company, it conducted extensive logging operations and had a 10 year lease to the state on 10,000 acres for a public hunting and wildlife management area.

Thus, the Kentucky Supreme Court properly concluded that:

> Stearns has not suffered an excessive interference with the legally protected use of the land that has been generally designated as a Wild River area, and the land has not been destroyed nor has an additional burden been placed upon the maintenance of that use. (Appellant's Appendix, 7a).

Utilizing the well-reasoned criteria of this Court as set forth in *Penn Central Transportation Co.* v. *New*

York City, 438 U. S. 104 (1978) to determine whether the Wild Rivers Act works a taking Appellee states that (1) the Appellant did not establish that the 1972 Act had an economic impact on it; (2) the Appellant did not prove that the Act interfered with any distinct investment backed expectations[9]; (3) The 1972 Act was not a physical invasion of the Appellant's property but rather a public program adjusting the benefits and burdens of economic life to promote the public good; (4) the 1972 Act permitted the continued use of the rugged, primitive stream areas for agricultural uses, for pipelines and utility lines, allowed roads to be used, and select cutting of timber could occur (historically a commercial enterprise in the wooded hills of Eastern Kentucky)[10]; (5) The Kentucky General Assembly included the protected stream areas very selectively based on express criteria; (6) Judicial review of the state's action in enforcing the Wild Rivers Act was and continues to be available.[11]

As in *Penn Central, supra,* this Court must conclude that the 1972 Act did not affect a taking as the restrictions imposed (which were not even put into

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[9]The record below establishes that for the parcel in question the Appellant neither had any reasonably foreseeable investment backed uses to be made of the property nor did it produce any specific offers by any person to either lease or purchase the parcels which were affected by the Wild Rivers Act.

[10]Under the 1976 Act all existing uses and changes of use could be conducted, except strip mining, pursuant to a permitting program.

[11]KRS 224.081(2), KRS 224.083, KRS 224.085 sets forth criteria for administrative and judicial review.

place under the holding of *Stephens, supra,* in the court below) were substantially related to the promotion of the general welfare and permitted reasonable beneficial uses of the stream areas by Appellant.

Appellant places great reliance upon *Hamilton Bank* v. *Williamson County Regional Planning Commission,* 729 F. 2d 402, (6th Cir.), cert. granted, 105 S. Ct. 80 (1984).

However, that case is easily distinguishable. Unlike the finding of the Court of Appeals in *Hamilton,* the Kentucky Supreme Court below found no interference with the Appellant's investment-backed expectations. The court in *Hamilton* held that, ". . . it is the application of the laws or regulations which effectuates the taking." The Kentucky Supreme Court expressly found and held that the state's application of the 1972 Act to Appellant amounted to no more than a possible action for trespass.

As the Appellant made and received substantial economic use and benefit from its property at all times in dispute and suffered no significant detrimental economic consequence, this is hardly a case calling for plenary consideration of major constitutional issues.

CONCLUSION

For all the foregoing reasons Appellee respectfully requests this Court to dismiss the appeal.

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APPENDIX

1972 KY. ACTS, CH. 117, § 15
CHAPTER 117
(S.B. 138)

Section 15. A new section of Chapter 146 of the Kentucky Revised Statutes is created to read as follows:

A fund for the purpose of carrying out the provisions of this Act is hereby created to be designated as a "Wild Rivers System Fund" to consist of all revenues derived from privileges, concessions, contracts, or otherwise, all monies received by gifts, contributions, donations and grants from public or private sources. Such "Wild Rivers System Fund" shall be disbursed by the Department of Natural Resources, after appropriations are made by law, for administration and other expenses and for other purposes provided by this Act.

1976 KY. ACTS, CH. 197, § 2, 9

Note: Text in brackets is deleted from prior law; text in italics is added to prior law.

Section 2. KRS 146.220 is amended to read as follows:

The General Assembly hereby recognizes that certain streams of Kentucky possess outstanding and unique scenic, recreational, geological, fish and wildlife, botanical, historical, archaeological and other scientific, aesthetic, and cultural values. It is the policy of the General Assembly to complement dam construction and development projects on Kentucky watercourses with other equally important and beneficial uses of our water resources. Therefore, it is hereby declared that in order to afford the citizens of the Commonwealth an opportunity to enjoy natural streams, to attract out-of-state visitors, to assure the well-being of our tourist industry, to preserve for future generations the beauty of certain areas untrammeled by man, it is in the interest of the Commonwealth to preserve some streams or

portions thereof in their free-flowing condition because their natural, scenic, scientific, and aesthetic values outweigh their value for water development and control purposes now and in the future. For aesthetic, as well as ecological reasons, the foremost priority shall be to preserve the unique primitive character of those streams in Kentucky which still retain a large portion of their natural and scenic beauty, and to prevent future infringement on that beauty by impoundments or other manmade works. Since the stream areas are to be maintained in a natural state, they will also serve as areas for the perpetuation of Kentucky's wild fauna and flora. Few such streams remain in the Eastern portion of the United States, and the General Assembly feels a strong obligation to the people of Kentucky to preserve these remnants of their proud heritage. It is the purpose of KRS 146.200 to 146.350 to establish a Wild Rivers System by designating certain streams for immediate inclusion in the system and by prescribing the procedures and criteria for protecting and administering the system. It is not the intent of KRS 146.200 to 146.350 to require or to authorize acquisition of all lands or interests in lands within the [exterior] boundaries of the stream areas but to assure preservation of the scenic, ecological and other values and to provide proper management of the recreational, wildlife, water and other resources. *It is the intent of KRS 146.200 to 146.350 to impose reasonable regulations as to the use of private and public land within the authorized boundaries of wild rivers for the general welfare of the people of the Commonwealth, and where necessary, to enable the department to acquire easements or lesser interests in or fee title to lands within the authorized boundaries of the wild rivers, so that the public trust in these unique natural rivers might be kept.*

Section 9. KRS 146.290 is amended to read as follows:

(1) The provisions of this section shall not apply to those uses existing at such time as a stream is included in the system.

(2) Land uses to be allowed within the [exterior] boundaries of a designated stream area shall be as follows:

New [No new] roads, *structures* or buildings *may* [shall] be constructed *only where necessary to effect a use permitted under the other provisions of this Act.* Utility lines or pipelines *may* [shall not] be constructed *as* [unless] approved by the secretary in writing and under provision that the affected land be restored as nearly as possible to its former state. This provision, however, shall in no way affect the rights between a landowner and a utility company or pipeline company. There shall be no *strip* mining *as defined in KRS 350.010,* and select cutting of timber *or other resource removal and agricultural use, may* [shall] be allowed [only] pursuant to regulations *promulgated* [issued] by the secretary *upon the granting of a permit under the other provisions of this Act.* All [land disturbances, including] instream disturbances such as dredging, shall be prohibited. Except for the management agency *and any existing uses which do not conform to the purposes and intent of this Act, travel upon a wild river or any public lands within the designated boundaries thereof,* [access] shall be by foot, horseback, canoe, boat or other nonmechanical modes of transportation. If there are existing agricultural areas within the boundaries of the area, such areas may continue to be used for agricultural purposes.

(3) Any landowner within the boundaries of the area may apply to the secretary for a change of use to permit the select cutting of timber, a resource removal or an agricultural use upon his property located within the area and

the secretary shall hold a public hearing after public notice on the application within sixty (60) days. The landowner or any interested person shall be allowed to present evidence as to whether the proposed use by the applying landowner are in accordance with the management plan developed pursuant to KRS 146.270, the purpose and intent of the Wild Rivers Act as expressed in KRS 146.220, and other applicable law.

(4) The secretary shall, within sixty (60) days, after said hearing, either:

(a) Issue an order, with accompanying opinion, denying the permit; or

(b) Issue an order, with accompanying opinion, granting the permit with such restrictions, terms and conditions as are appropriate to protect to the fullest extent possible the wild rivers area and the public trust therein within the intent of KRS 146.220; or

(c) Recommend an alternate use to which the land may be put under this Act which is more consistent with the purposes and intent of this Act than the use for which application was made.

(d) Institute condemnation proceedings in the circuit court of the county in which the land is located or else negotiate a purchase of the land affected, or any interest therein.

(5) On or before thirty (30) days from the date of the secretary's ruling, the landowner may file with the department a written objection to the ruling. If, within the next sixty (60) days the landowner and the secretary are unable to reach an agreement with respect to a modification of his ruling, the secretary must either permit the use applied for, condemn the property, or petition the Franklin Circuit Court for an order restraining the proposed use. The order shall be entered immediately upon the filing of the petition

and the execution of a bond without surety by the Commonwealth in an amount satisfactory to the court to indemnify the landowner against loss of profits from any wrongful restraint of the use of his property during the period from the filing of the petition until such time as the matter is included by the courts. The court shall review the decision as to both law and fact, but no factual finding shall be reversed unless clearly erroneous or else arbitrary, capricious, or an abuse of discretion.